

“DENIED”

**Failures in accountability for
human rights violations by
security force personnel in
Jammu and Kashmir**



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First published in 2015 by
Amnesty International Ltd
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom

© Amnesty International 2015

Index: ASA 20/1874/2015
Original language: English
Printed by Amnesty International,
International Secretariat, United Kingdom

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Cover photo: Family members of Ashiq Hussain Ganai, who was allegedly tortured to death in custody in 1993
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GLOSSARY

AFSPA:	Armed Forces (Jammu and Kashmir) Special Powers Act, 1990; Armed Forces (Special Powers) Act, 1958
BSF:	Border Security Force
CAT:	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CID:	Criminal Investigation Department, Jammu and Kashmir Police
CIK:	Counter-Intelligence Kashmir, a special unit of the Jammu and Kashmir Police
CRPC:	Code of Criminal Procedure, 1973
CRPC:	Jammu and Kashmir State Code of Criminal Procedure, 1989 (similar, but not identical to the CRPC, 1973)
CRPF:	Central Reserve Police Force
CWP:	Criminal Writ Petition
DGP:	Director General of Police
DIG:	Deputy Inspector General of Police
DS:	Deputy Superintendent
DSP:	Deputy Superintendent of Police
FIR:	First Information Report
JKLF:	Jammu and Kashmir Liberation Front
IPC:	Indian Penal Code, 1860
ITBP:	Indo-Tibetan Border Police
MHA:	Ministry of Home Affairs, Government of India
MOD:	Ministry of Defence, Government of India
OWP:	Original Writ Petition
NSG:	National Security Guard
PSA:	Jammu and Kashmir Public Safety Act, 1978
RPC:	Jammu and Kashmir State Ranbir Penal Code, 1989 (virtually identical to Indian Penal Code, 1860)
RR:	Rashtriya Rifles
RTI:	Right to Information
SHO:	Station House Officer
SSP:	Senior Superintendent of Police
SP:	Superintendent of Police



1. BACKGROUND

The last time 17 year old Javid Ahmad Magray's family saw him alive, he was studying in his room. It was late on the evening of 30 April 2003. When they came downstairs the next morning, Javid was gone.

His father Ghulam Nabi Magray saw a few army personnel standing at the gate outside and told them that his son was missing. They said, 'Don't look for him, go back home.' But down the road, Ghulam Nabi and his wife Fatma Begum could see blood stains and a tooth lying on the pavement. Soon after, their neighbours gathered. When they saw the blood stains they immediately began shouting and protesting, demanding to know Javid's whereabouts.

During the investigations that followed, Ghulam Nabi testified that the officer in charge of the army camp at Sulleng had told them that Javid was in the Nowganj police station. The family had rushed to the police station only to be told that Javid had been brought there at about 3 am but was then taken to Bazzila Hospital, then shifted to SMS Hospital, and finally to Sonra Medical Institute, where he was declared dead.

An officer at Sulleng testified during investigations that Javid Ahmad Magray had been wounded in an encounter with some security force personnel, he was taken to Nowganj police station and later to a hospital, where he succumbed to his injuries. The chief [Senior] Police Officer of Nowganj police station testified that the same officer of the Assam Regiment, on May 1, 2003 at 2:30 am came with a written application that their

¹ Amnesty International India interview with Ghulam Nabi Magray, Budgam district, Jammu and Kashmir on 12 September 2013.

² Office of the Assistant Commissioner Revenue, Additional District Magistrate, Budgam, "Inquiry Report Into The Cause of Death of Javid Ahmad Magray," August 12, 2003, Enq/960/SQ. Copy on file with Amnesty International India.

³ Office of the Assistant Commissioner Revenue, Additional District Magistrate, Budgam, "Inquiry Report Into The Cause of Death of Javid Ahmad Magray," August 12, 2003, Enq/960/SQ. Copy on file with Amnesty International India.

party was on patroling of the area and at 00:30 hours [one of it was wounded] while the others taking the benefit of heavy rains and darkness succeeded in running away.

The police registered a First Information Report (FIR) and sent Javid Ahmad Magray to hospital. They also testified that the police station had no record that Javid Ahmad was involved in anti-national activity or militancy.⁴

Relatives and neighbours of Javid Ahmad Magray, his teachers and representatives of the army and police all took part in the inquiry into his death, chaired out by the district magistrate. The report concluded that the army's version of events was false, and that the “deceased boy was not a militant, and has been killed without justification by a Subedar [a junior commissioned officer in the Indian Army] and an army clerk being the head of the patroling party.”

According to the trial magistrate report, the Subedar left Srinagar and failed to respond to official summons to record his statement for the purposes of investigation of the army, in a letter to the magistrate, said that the Subedar's unit had been moved and suggested that further correspondence should be sent to a higher army address. A subsequent letter duly sent was returned undelivered after sixteen days.

In a letter dated 16 July 2007, the Jammu and Kashmir (J & K) State Home Department wrote to the Joint Secretary (K 1), Ministry of Defence in Delhi to seek sanction to prosecute the army personnel against whom the state police had filed charges of murder and conspiracy to murder for Javid Ahmad Magray's death. The letter stated that the deceased was a student and was not linked with militancy. He was killed by Assam Regiment after kidnapping. The case registered by the Assam Regiment against the deceased as a ‘militant from whom arms and ammunition was recovered’ has been closed as not proven.⁵ The letter requested the Ministry of Defence to ‘kindly accord sanction of prosecution as is envisaged under section 302 of the Jammu and Kashmir Arms Force Special Powers Act, 1990’ against the army officials.

Ghulam Nabi knows that the case was sent for sanction or official permission to prosecute the security force personnel – under the AFSPA in 2007 but says he has received no information on the outcome of the application. “We simply never heard what happened with it,” he told Amnesty International India. A Ministry of Defence document dated 30 January 2012 simply states that sanction for prosecution was withheld on the grounds that “the individual killed was a militant from whom arms and ammunition was recovered.” No reliable and tangible evidence has been referred to in the investigation report.⁶

⁴ Office of the Assistant Commissioner Revenue, Additional District Magistrate, Budgam, “Inquiry Report Into The Cause of Death of Javid Ahmad Magray,” August 12, 2003, Enq/960/SQ. Copy on file with Amnesty International India.

⁵ Office of the Assistant Commissioner Revenue, Additional District Magistrate, Budgam, “Inquiry Report Into The Cause of Death of Javid Ahmad Magray,” August 12, 2003, Enq/960/SQ. Copy on file with Amnesty International India.

⁶ Additional Secretary to Government, Home Department, Jammu & Kashmir, “Accord of sanction for launching prosecution in case FIR no. 64/2003 under Section 302, 120-B RPC Police Station Nowgam. No. Home/25/2007”. Copy on file with Amnesty International India.

⁷ International Peoples' Tribunal for Human Rights and Justice in Indian Administered Kashmir (ITPK) and Association of Parents of Disappeared Persons (APDP), “Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir”, December 2012, p.241-243, Annexure 3, http://kashmirprocess.org/reports/alleged_Perpetrators.pdf (accessed on April 9, 2015). (ITPK and APDP, “Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir” December 2012)

Javaid Ahmad Magray is just one of hundreds of victims of alleged human rights violations committed by security force personnel that Amnesty International and other organizations, both local and international, have documented in the course of the past 25 years in Jammu and Kashmir.⁹ The words of his father reflect the frustration and despair felt by many families across the state at the refusal of the Indian authorities to hold to account those responsible for serious human rights violations.

Indian security forces have been deployed in Jammu and Kashmir for decades, officially tasked with protecting civilians, upholding national security and combatting violence by armed groups. However, in the name of security operations, security force personnel have committed many grave human rights violations which have gone unpunished. The failure to address these abuses violates the rights of the victims and survivors to justice and remedy, which is enshrined in the Constitution of India and international human rights law.

The violence in Jammu and Kashmir has taken a terrible human toll on all sides. From 1990 to 2011, the Jammu and Kashmir state government reportedly recorded a total of over 43,000 people killed. Of those killed, 21,323 were said to be “militants”,¹⁰ 13,226 “civilians” (those not directly involved in the hostilities) killed by armed groups, 5,369 security force personnel killed by armed groups, and 3,642 “civilians” killed by security forces.¹¹ Armed groups have committed thousands of abuses.¹² In general, victims of human rights abuses in the state have been unable to secure justice, regardless of whether the perpetrator is a state or non-state actor.

Shocking as the government statistics are, human rights activists and lawyers say that the figure of civilian deaths caused by the security forces fails to reflect the true scale of violations by security forces. Activists estimate that up to half of all human rights violations by security force personnel may have gone unreported in

⁸ ITPK and APDP, “Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir” December 2012, p.243.

⁹ Besides the Army and its specialist counter-insurgency arm, the Rashtriya Rifles (RR), (under the Ministry of Defence), there are seven Central Armed Police Forces (under the authority of the Ministry of Home Affairs): the Central Reserve Police Force (CRPF), the Border Security Force (BSF), the National Security Guard (NSG), the Indo-Tibetan Border Police (ITBP), the Sashastra Seema Bal (SSB), the Assam Rifles, and the Central Industrial Security Force (CISF). Most of them also operate in Kashmir.

¹⁰ The authorities’ usage of the term “militant” is controversial and open to interpretation, and therefore this category could include killings that amount to extrajudicial executions.

¹¹ Randeep Singh Nandal, “State data refutes claim of 1 lakh killed in Kashmir” Times of India, 20 June 2011, <http://timesofindia.indiatimes.com/India/State-data-refutes-claim-of-1-lakh-killed-in-Kashmir/articleshow/8918214.cms> (accessed 9 April 2015).
*Note: Data collected by the South Asian Terrorism Portal (SATP) states that 49 civilians were killed between July 2011 and March 2014, bringing the total number of civilians killed to 16,917 for one estimate. However, the SATP does not state whether the civilians killed were killed by armed groups or security forces.

¹² For a representative sample of Amnesty International’s documentation of abuses by armed groups in Jammu and Kashmir see: India: Civilians are not legitimate targets (AI Index: ASA 20/013/2002), 15 July 2002, <http://www.amnesty.org/en/library/info/ASA20/013/2002/en> (accessed 9 April 2015); India/Kashmir: Safeguard the lives of civilians (AI Index: ASA 20/013/2003), 24 March 2003, <http://www.amnesty.org/en/library/info/ASA20/013/2003/en> (accessed 9 April 2015); India: Armed groups in Jammu and Kashmir targeting civilians violate humanitarian standards (AI Index: ASA 20/016/2005), 6 April 2005, <http://www.amnesty.org/en/library/info/ASA20/016/2005/en> (accessed 9 April 2015).

the 1990s and early 2000s.¹³ Amnesty International reports in the early to mid-1990s documented a large number of instances of torture and deaths in custody of security forces.¹⁴ This organization alone recorded more than 800 cases of torture and deaths in the custody of army and other security forces in the 1990s, and hundreds of other cases of extrajudicial executions and enforced disappearances from 1989 to 2013.

Amnesty International's research over a number of years has repeatedly uncovered patterns of impunity, including unlawful government orders to the police not to register complaints of human rights violations against the security forces.¹⁵

One of the primary facilitators of impunity for security force personnel has been the existence of provisions like Section 7 of the Armed Forces Special Act (AFSPA), 1990 under which members of the security forces are protected from prosecution for alleged human rights violations.¹⁶ Similar to clauses in a number of other Indian laws, this legal provision mandates prior executive permission from the central or state authorities for the prosecution of members of the security forces. These provisions, called “sanctions” in India, have been used to provide virtual immunity for security forces from prosecution for criminal offences.

To date, not a single member of the security forces deployed in Jammu and Kashmir over the past 25 years has been tried for alleged human rights violations in a civilian court. An absence of accountability has ensured that security force personnel continue to operate in a manner that facilitates serious human rights violations. A former senior military official publicly argued in October 2013: “Immunity under AFSPA allows our soldiers to make mistakes. Insurgency will come to an end, you need to train soldiers better, I agree, but don’t remove the AFSPA.”¹⁷

Following a visit to India in March 2012, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions expressed concern that sanction provisions in India “effectively render a public servant immune from criminal prosecution... It has led to a context where public officers evade liability as a matter of course, which encourages a culture of impunity and further recurrence of violations.”¹⁸ These fears are well founded.

Despite assurances from the Chief of Army Staff and the Head of the Army’s Northern Command in December

¹³ Amnesty International India interview with Zahoor Wani, Association of Parents of Disappeared Persons, September 2013. The Association has documented more than 1,500 cases of disappeared persons, half of which Zahoor Wani says were never reported to the authorities for fear of reprisal.

¹⁴ Amnesty International, India: Torture and deaths in custody in Jammu and Kashmir (AI Index: ASA 20/001/95), 31 January 1995, <https://www.amnesty.org/en/documents/ASA20/001/1995/en/> (accessed 9 April 2015); India: Torture continues in Jammu and Kashmir (AI Index: ASA 20/33/95), November 1995, <http://www.amnesty.org/en/library/info/ASA20/033/1995/en> (accessed 9 April 2015).

¹⁵ Amnesty International, India: Analysis of the Government of India's response to Amnesty International's report on torture and deaths in custody in Jammu and Kashmir (AI Index: ASA 20/005/1995), March 1995, <https://www.amnesty.org/fr/documents/ASA20/005/1995/en/> (accessed 9 April 2015).

¹⁶ Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, Section 7. Available at http://indianarmy.nic.in/Site/RTI/rti/MML/MML_VOLUME_3/CHAPTER__03/457.htm (accessed 17 April 2015).

¹⁷ A Public Lecture titled “Kashmir: Where are We and Where are We Going”, by Lt. Gen. Syed Ata Hasnain (Retd) in Bangalore, 12 October 2013. Notes on file with Amnesty International India. The speaker was formerly the General Officer Commanding of 15 Corps based in Srinagar and which covers the entire Kashmir valley.

¹⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Mission to India (UN Doc: A/HRC/23/47/Add.1), 26 April 2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf (accessed 9 April 2015). (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2013).

2013 that there is “zero tolerance” for human rights violations by the army,¹⁹ more than 96% of all complaints brought against the army in Jammu & Kashmir have been dismissed as “false and baseless” or “with other ulterior motives of maligning the image of Armed Forces.”²⁰ The small number of cases in which complaints against personnel have been investigated and military trials conducted are closed to public scrutiny. Few details of investigations conducted by the security forces are available to the public. The military are notoriously reluctant to share substantive information about how they conduct inquiries and trials by court-martial into human rights violations. There is even less information publicly available about investigations and trials conducted by paramilitary forces.

“A number of complaints of human rights violations against the Army are found to be false and instigated by inimical elements...such complaints are aimed at maligning the Army and embroiling it in legal tangles and provide ripe fodder for various human rights activists and separatist organizations to subvert the minds of the general population.”

“Human Rights and the Northern Army”, Indian Army Headquarters Website, Human Rights Cell²¹

With the continued existence and enforcement of legal provisions like AFSPA, access to effective legal remedies for victims of human rights violations and their relatives in J&K remains as limited today as it was in the 1990s.

Families interviewed in 2013 say that positive measures such as an increase in the number of police stations, the establishment of the Jammu & Kashmir State Human Rights Commission in 1997, and increased stability in the region, have made it easier to report human rights violations in recent years.

However, while the criminal justice system may have become more accessible in comparison to the 1990s and early 2000s, Amnesty International India’s recent research reveals how even the slow journey towards justice in a few cases is undermined by the government’s recourse to legal provisions to shield members of the security forces from prosecution at any cost, and a military justice system that fails to hold its personnel accountable for human rights violations.

This report seeks to expose the government’s complicity in facilitating impunity for security forces in Jammu

¹⁹ “Army reiterates zero tolerance on human rights violations” First Post, 2 January 2014, <http://www.firstpost.com/india/army-reiterates-zero-tolerance-on-human-rights-violations-1320011.html> (accessed 9 April 2015).

²⁰ Indian Army web portal, “Human Right Cell and Handling of Human Rights Violation Cases in the Army”, <http://indianarmy.nic.in/Site/FormTemplate/frmTempSimple.aspx?MnId=TMcObNMKb7TiapbzKWVpeA==&ParentID=mgRuNTM5R9l0qk0JrfPv3Q==&flag=OLsUIhCJDYK2YZORoKE52Q> (accessed 10 April 2015). (Indian Army web portal, “Human Right Cell and Handling of Human Rights Violation Cases in the Army”).

²¹ Northern Command, Indian Army website, “Northern Army and Human Rights.” Section 16, <http://indianarmy.nic.in> (accessed 9 April 2015). (Northern Army and Human Rights, Section 16)

and Kashmir, and challenge the de jure and de facto practices it uses to block justice for victims of human rights violations.

This report challenges the use of sanction provisions under the AFSPA; demonstrates how the denial of sanction or permission has been routine and entirely lacking in transparency; and argues that the continued use of the AFSPA violates India’s constitutional guaranteed rights to life, justice and remedy. By not addressing human rights violations committed by security force personnel in the name of national security, India has not only failed to uphold its international obligations, but has also failed its own Constitution.

This report also documents how legislation governing the armed forces and internal security forces allows for broad security force jurisdiction over criminal offences – including human rights violations – ensuring that investigations and trial of those accused of human rights violations takes place under a military justice system that violates international standards for fair trials. Further, it demonstrates how security forces operating in Jammu and Kashmir have exacerbated this situation by routinely failing to cooperate with criminal investigations, civilian courts and government-ordered enquiries, and subjecting those pursuing complaints to threats, intimidation and harassment.

2. METHODOLOGY

The findings of this report are based primarily on field research and documentation collected by an Amnesty International India team, during visits to multiple districts in Jammu and Kashmir in September and November 2013, and information provided by the central and state government authorities following applications for information filed under the Right to Information (RTI) Act, 2009 (Jammu and Kashmir State Act) and 2005 (Central Act).

Amnesty International India’s research team visited the two capitals of the state, Srinagar and Jammu, to meet with state officials, and the districts of Anantnag, Baramulla, Shopian, Pulwama, Budgam, Ganderbal, Bandipora and Kupwara. During the visit, researchers met with civil society groups such as the Association of the Parents of Disappeared Persons (APDP), the Jammu and Kashmir Coalition for Civil Society (JKCCS), advocacy groups, lawyers, legislators, politicians, representatives of separatist groups, and representatives of the state government, including the Law Department, Home Department, the State Human Rights Commission, State Women’s Commission, and officials at the state police headquarters. Meetings were sought with central government officials in the Ministry of Home Affairs and Ministry of Defence in New Delhi, but official requests remained unanswered.



Researchers also met with 58 family members of victims of alleged human rights violations by security forces. These included both male and female members of each family when possible, including fathers, mothers, widows, brothers and sisters.

Interviews were conducted in Urdu, Kashmiri, Hindi and English, with the assistance of local interpreters wherever required. Where requested, the names of some persons interviewed during the course of research have been withheld for reasons of security and confidentiality.

Amnesty International India carried out specific research into cases included in official lists of cases in which sanction to prosecute was denied by the Ministry of Defence between 1990 and 2012. These lists were provided to Amnesty International India by the Jammu and Kashmir Coalition for Civil Society (JKCCS) which obtained them from the government after filing RTI applications in 2011 and 2012.

The International People’s Tribunal on Human Rights and Justice in Jammu and Kashmir (IPTK), published a report - “Alleged Perpetrators: Stories of Impunity from Jammu and Kashmir” - in December 2012 that documented 214 cases of human rights violations based on police reports, families’ testimonies, and

government records obtained through the RTI Act, and provided information such as court and police records to Amnesty International India on cases in which permission to prosecute was denied under the AFSPA.

Amnesty International India also filed RTI applications in June 2013 seeking updated information from the Ministry of Defence and Ministry of Home Affairs on cases in which the central and state governments have received requests from Jammu and Kashmir state police for sanction to prosecute. Amnesty International India sought information on the number of requests for sanction that have been denied or remain pending along with case numbers, charges filed against the accused, names of the accused, names of the victims, and details of each incident.

Amnesty International India received a reply from the Ministry of Defence on 18 August 2013 providing information on the number of requests for sanction received by the Ministry between 1990 and 2013. However, details of each case were withheld, citing sections of the RTI Act that exempt the government from providing information that would “prejudicially affect the sovereignty and integrity of India,” or “information which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes.”²² This was despite the fact that detailed information of this sort had previously been provided to human rights activists as referred to above.

Amnesty International India received two notifications from the Ministry of Home Affairs dated 10 July 2013 and 5 August 2013 in response to its application for information, indicating that it had been forwarded to the appropriate authorities. However, no further information has been received. Amnesty International India also filed RTI applications seeking information from the seven internal security forces in India. The only forces to reply were the Central Reserve Police Force (CRPF) and Border Security Force (BSF). Both declined to provide the information requested.

RTI applications were also filed on behalf of Amnesty International India with the Jammu and Kashmir State Home Department by Muzaffar Bhat, an RTI activist based in Srinagar. Information requested included the number and details of requests for sanction for prosecution forwarded to the central Ministry of Home Affairs and Ministry of Defence between 1990 and 2013, and the number and details of cases requesting sanction from the state government to prosecute state police personnel for human rights violations under section 197 of the Jammu and Kashmir Code of Criminal Procedure (J&K CrPC). The state government provided the number of cases forwarded to the Ministry of Defence and Ministry of Home Affairs between 1990 and 2013, but withheld any details of these cases. The authorities did not respond to the application for the number of requests for sanction to prosecute under section 197 of the J&K CrPC in the same period.

This report also relies on data collected through daily news monitoring of issues related to past and ongoing human rights violations in the Jammu and Kashmir region; court and police records of families’ cases; and academic and other professional publications.

²² Right to Information Act, 2005, Sections 8(1) (a) and (g). Available at <http://righttoinformation.gov.in/rti-act.pdf> (accessed 17 April 2015), p. 7.

Amnesty International India would like to thank Parvez Imroz, Khurram Parvez and other staff of the Jammu and Kashmir Coalition for Civil Society, Parveena Ahangar and staff of the Association of Parents of Disappeared Persons, and the lawyers of the Jammu and Kashmir High Court Bar Association, among many others who provided us with information, insight and logistical support.

Amnesty International India sent a copy of this report to authorities in the Ministry of Home Affairs on 27 April 2015, seeking a response to its findings by 14 May 2015. A copy was also sent to the Ministry of Defence on 6 May 2015, seeking a response by 20 May 2015.

On 22 May 2015, Amnesty International India wrote again to both Ministries, extending the time for response to 20 June 2015. Neither Ministry had responded at the time of publication.

3. HISTORICAL CONTEXT

The region of Kashmir has been a site of violence and conflict for decades. The AFSPA was introduced in parts of Jammu and Kashmir in 1990, following the beginning of an armed separatist movement for independence.

Throughout the 1990s and 2000s, there were grave human rights abuses committed by security forces as well as armed opposition groups. The 1990s witnessed a number of attacks by armed opposition groups on the Hindu minority Kashmiri Pandit community leading to hundreds of thousands fleeing the valley to live in displacement camps in Jammu and Delhi. Over the past decade, there has been a marked decrease in the level of violence. Regular local and national elections have taken place, notably in 2002, 2008 and 2014.

Popular protests against the state and security forces operating in the valley have been a feature of life in Jammu and Kashmir for many years. In recent years, particularly in parts of Srinagar and North Kashmir, protests have taken the form of marches with some young people throwing stones and security forces retaliating, at times with gunfire. More than 100 protestors, some of whom engaged in stone pelting, were shot dead by security forces in the summer of 2010. A further 3,500 persons were reportedly arrested and 120 detained under the Jammu and Kashmir Public Safety Act (PSA).²³ In 2014, the Jammu and Kashmir State Home Department, in response to an RTI application, disclosed that 16,329 people had been detained in administrative detention under the PSA at various times since 1988.²⁴

In September 2010, the Government of India announced the appointment of a group of interlocutors to “begin the process of a sustained dialogue with all sections of the people of Jammu & Kashmir.”²⁵ The group of interlocutors recommended that the government rehabilitate all victims of violence, facilitate the return of communities displaced from their homes, reduce “the intrusive presence of security forces”, and review the implementation of various Acts “meant to counter militancy”. However no formal action has been taken on the report.

In August 2011, the State Human Rights Commission (SHRC) in J&K stated that it had found 2,730 unidentified bodies buried in unmarked graves in three districts of north Kashmir. The SHRC announced its intention to attempt to identify the bodies through DNA sampling.²⁶

²³ Wasim Khalid, “3500 arrests, 120 PSA detentions”, Greater Kashmir, 29 December 2010, <http://greaterkashmir.com/news/2010/Dec/30/3500-arrests-120-psa-detentions-51.asp> (accessed 9 April 2015).

²⁴ Umer Maqbool, “Shocker: 16,329 PSA cases slapped in Jammu and Kashmir since 1988,” Greater Kashmir, 25 February 2014, <http://www.greaterkashmir.com/news/2014/Feb/26/shocker-16-329-cases-of-psa-slapped-in-jk-since-1988-40.asp> (accessed 9 April 2015); Amnesty International, India: A ‘lawless law’: Detentions under the Jammu and Kashmir Public Safety Act (ASA 20/001/2011), 21 March 2011, <https://www.amnesty.org/en/documents/ASA20/001/2011/en/> (accessed 17 April 2015).

²⁵ Government of India, Ministry of Home Affairs, “Decisions Taken by CCS Regarding Jammu & Kashmir on Saturday”, 25 September 2010, <http://pib.nic.in/newsite/erelease.aspx?relid=65989> (accessed 9 April 2015).

²⁶ Special Correspondent, “J&K Human Rights Commission’s SIT confirms 2,156 unidentified bodies in ‘mass graves’”, The Hindu, August 22, 2011, <http://www.thehindu.com/news/national/jk-human-rights-commissions-sit-confirms-2156-unidentified-bodies-in-mass-graves/article2379921.ece> (accessed 9 April 2015).

However, the J&K state government informed the SHRC in August 2012 that conducting DNA profiling of the unmarked graves would not be possible because of inadequate resources, including lack of forensic laboratories and finances.²⁷ No further action has since been taken.

In February 2013, unrest in the state was sparked by the secret execution of Mohammed Afzal Guru, after he was convicted of involvement in an attack on the Indian Parliament in New Delhi in 2001.²⁸ Widespread protests in the Kashmir valley resulted in dozens of injuries to protesters, and several deaths due to firing by security forces.

Although less frequent than in the 1990s and early 2000s, deaths of members of the general population due to firing by security forces remain disturbingly regular. In 2013 alone, there were 12 deaths by security force firings in Jammu and Kashmir.²⁹ Government-ordered enquiries into each of these deaths remain closed to public scrutiny, and no action appears to have been taken by the authorities to complete criminal investigations in a timely manner and prosecute suspects.³⁰ In all 12 cases, media reports quoted police officials stating that none of the individuals killed had any links to militancy.

On 3 November 2014, two men were killed and two others seriously injured in Budgam district when Indian army personnel opened fire at their vehicle after it failed to stop at two army checkpoints.³¹ In an unusual move, the army authorities publicly admitted responsibility for the deaths of the two young men, Faisal Yusuf Bhat and Mehrajuddin Dar, and said that the killings were “a mistake”.

On 27 November, army authorities announced that nine personnel of the 53 Rashtriya Rifles would be formally

²⁷ “Unmarked Graves: Rights group asks SHRC for DNA test.” The Indian Express, 30 August 2012, <http://archive.indianexpress.com/news/unmarked-graves-rights-group-asks-shrc-for-dna-test/995459/0> (accessed 9 April 2015).

²⁸ Amnesty International, India: New Execution Points to Worrying and Regressive Trend (AI Index: PRE 01/071/2013), 9 February 2013, <http://www.amnesty.ca/news/news-releases/india-new-execution-points-to-worrying-and-regressive-trend> (accessed 17 April 2015).

²⁹ “Tahir Sofi’s killing evokes widespread condemnation”, Greater Kashmir, 6 March 2013, <http://www.greaterkashmir.com/news/2013/Mar/7/tahir-sofi-s-killing-evokes-widespread-condemnation-62.asp> (accessed 9 April 2015). Also see Amnesty International India: Authorities must not shield soldiers suspected of involvement in Bandipora killings (AI Index: ASA 20/047/2013), 2 July 2013, <https://www.amnesty.org/en/documents/ASA20/047/2013/en/> (accessed 9 April 2015); Amnesty International India: Urgent investigation needed as protests continue in Kashmir, 22 July 2013, <https://www.amnesty.org/en/articles/news/2013/07/india-urgent-investigation-needed-protests-continue-kashmir/> (accessed 9 April 2015); “Shopian killings: witness statement recording begins on Monday,” The Hindu, 15 September 2013, <http://www.thehindu.com/news/national/other-states/shopian-killings-witness-statement-recording-begins-on-monday/article5130595.ece> (accessed 9 April 2015).

³⁰ “Tahir Sofi Killing: Let people know the outcome of probe”, Rising Kashmir, 19 September 2013, <http://www.risingkashmir.com/tahir-sofi-killing-let-people-know-outcome-of-probe-family/> (accessed 9 April 2015); “BSF inquiry blames its own men for Gool Massacre in Kashmir”, Authint Mail, 22 January 2014, <http://www.authintmail.com/article/kashmir/bsf-inquiry-blames-its-own-men-gool-massacre-kashmir> (accessed 9 April 2015); Abhinav Verma, “2 months on, inquiry into Gool killings yet to start”, Greater Kashmir, 3 October 2013, <http://www.greaterkashmir.com/news/2013/Oct/4/2-months-on-inquiry-into-gool-killings-yet-to-start-62.asp> (accessed 9 April 2015); Deeptiman Tiwary, “BSF may fix J&K Ramban firing blame on imam”, Times of India, 3 December 2013, http://articles.timesofindia.indiatimes.com/2013-12-03/india/44709363_1_bsf-jawans-bsf-men-holy-quran (accessed 9 April 2015).

³¹ M. Saleem Pandit, “Budgam firing: Survivor recounts horror, says sound of screeching tyres caused army men to fire”, Times of India, 7 November 2014, <http://timesofindia.indiatimes.com/india/Budgam-firing-Survivor-recounts-horror-says-sound-of-screching-tyres-caused-armymen-to-fire/articleshow/45071369.cms> (accessed 9 April 2015); Amnesty International India: Military must cooperate with police investigations into Budgam killings, 5 November 2014, <http://www.amnesty.org.in/show/news/military-must-cooperate-with-police-investigations-into-budgam-killings/> (accessed 16 April 2015).

prosecuted under military law for the killings.³² The father of one of the men continued to ask for the army personnel to be tried by a civilian court.³³

Suspected members of armed groups have continued to target members of the general public and local government officials, particularly around elections. National elections held in May 2014 saw a rise in the number of attacks against election officials, resulting in the deaths of a local village head and his son in Pulwama district, and another village leader in the same district on 21 April 2014.³⁴

The most recent state assembly elections were held between 25 November and 23 December 2014. A coalition government comprising the Bharatiya Janata Party and the Jammu and Kashmir Peoples Democratic Party took office on 1 March 2015, and released a ‘Common Minimum Programme’ setting out their joint agenda. The programme states: “While both parties have historically held a different view on the Armed Forces Special Powers Act (AFSPA) and the need for it in the State at present, as part of the agenda for governance of this alliance, the Coalition Government will examine the need for de-notifying ‘disturbed areas’. This, as a consequence, would enable the Union Government to take a final view on the continuation of AFSPA in these areas.”³⁵

Armed groups have been responsible for thousands of human rights abuses in Jammu and Kashmir. Victims of these abuses too have been unable to obtain justice. Amnesty International India consistently opposes all human rights abuses perpetrated by armed groups in Jammu and Kashmir, and calls for those responsible to be brought to justice.

³² “Budgam firing: Army indicts 9 soldiers for killing two youths in Jammu and Kashmir”, DNA India, 27 November 2014, <http://www.dnaindia.com/india/report-budgam-firing-army-indicts-9-soldiers-for-killing-two-youths-in-jammu-and-kashmir-2038858> (accessed 9 April 2015).

³³ Suhasini Raj, “Indian Army Indicts 9 Soldiers in Killing of 2 Civilians in Kashmir”, The New York Times, 28 November 2014, <http://www.nytimes.com/2014/11/29/world/asia/indian-army-indicts-9-soldiers-in-killing-of-2-civilians-in-kashmir.html> (accessed 9 April 2015).

³⁴ “Lok Sabha elections: Militants kill three including sarpanch before voting in Kashmir”, DNA India, 22 April 2014, <http://www.dnaindia.com/india/report-lok-sabha-elections-militants-kill-three-including-sarpanch-before-voting-in-kashmir-1980795> (accessed 9 April 2015).

³⁵ “Full text: Common Minimum Programme of PDP-BJP government in J&K”, IBN Live, 2 March 2015, <http://ibnlive.in.com/news/full-text-common-minimum-programme-of-pdpbjp-government-in-jk/531591-37-64.html> (accessed 16 April 2015).

4. LEGAL CONTEXT

4.1 LAWS COVERING SECURITY FORCE OPERATIONS IN JAMMU AND KASHMIR

The state of Jammu and Kashmir (with the exceptions of Leh and Ladakh districts) is classified as a “disturbed area” under section 3 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, according to the state government.³⁶

Section 4 of the AFSPA empowers officers (both commissioned and non-commissioned) in a “disturbed area” to “fire upon or otherwise use force, even to the causing of death” not only in cases of self-defence, but against any person contravening laws or orders “prohibiting the assembly of five or more persons.”

The classification of “disturbed area”, as described in greater detail in Chapter 5, has allowed the army and paramilitary forces to argue that they are on “active duty” at all times and that therefore all actions carried out in the state – including human rights violations – are carried out in the course of official duty, and are to be treated as service-related acts instead of criminal offences.

The Army Act, 1950, and similar legislation governing the internal security forces, contain provisions that prohibit security forces from investigating or trying “civil offences” such as murder or rape in the military justice system unless the act was committed “(a) while on active service, or (b) at any place outside India, or (c) at a frontier post specified by the Central Government by notification in this behalf.”³⁷ The classification of an area as “disturbed” has allowed the military and other security forces to claim that even serious human rights violations – extrajudicial executions, enforced disappearance, rape and torture – can only be tried by military courts, as the soldiers are considered to be on “active service” at all periods in such areas.

There are currently four main security forces operating in Jammu and Kashmir: the Army, the Central Reserve Police Force (CRPF); the Border Security Force (BSF), and the state police.

In recent years, the army has largely withdrawn from towns in the state, including the capital Srinagar, and the town of Anantnag in south Kashmir among others, leaving the maintenance of law and order to the Central Reserve Police Force and the state police. Although the Government of India remains secretive about the size of troop deployment in Jammu and Kashmir, some experts not associated with the government estimate that 60,000 army personnel are stationed in the interior of the state to aid in counter-insurgency operations and the

³⁷ A state or area must be classified as ‘disturbed’ for the AFSPA’s provisions to come into effect. In 1990, the Jammu and Kashmir state government enacted a state law known as the Disturbed Areas Act, which gave the state government the power to deem areas ‘disturbed’. Different versions of the law were in force until 1998. Since then, the state has been considered to be notified as ‘disturbed’ by notification from the central government under section 3 of the AFSPA. However notifications have not been periodically reviewed, as directed by the Supreme Court. See Muzamil Jaleel, “Explained: AFSPA-Disturbed Areas debate in J&K”, Indian Express, 30 March 2015, <http://indianexpress.com/article/explained/explained-afspa-disturbed-areas-debate-in-jk/0/> (accessed 20 April 2015)

³⁸ The Army Act, 1950, section 70: “Civil offence not triable by court-martial”. Available at [https://www.icrc.org/applic/ihl/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/7c91b6e66e366be7c1257679004cfd65/\\$FILE/The%20Army%20Act,%201950.pdf](https://www.icrc.org/applic/ihl/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/7c91b6e66e366be7c1257679004cfd65/$FILE/The%20Army%20Act,%201950.pdf) (accessed 17 April 2015). (The Army Act, 1950). All Central Armed Police Forces Acts contain identical or similar provisions.

maintenance of law and order, while the rest of the army deployment guards the border and “Line of Control” with Pakistan. The army’s 60,000 troops are in addition to deployments of CRPF and BSF personnel, whose primary charge is to aid the state police in the maintenance of law and order.³⁸

Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act enhances the protection provided to members of the security forces by requiring sanction or permission from the central government before members of the military or other security forces can be prosecuted in civilian courts. In the Army’s case, the concerned authority is the Ministry of Defence. For cases involving members of the internal security forces, permission has to be obtained from the Ministry of Home Affairs.

Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act 1990 Protection to persons acting in good faith under this Act

No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

The classification of Jammu and Kashmir as a “disturbed area” has allowed for the broad interpretation of the phrase in Section 7: “anything done or purported to be done in the exercise of the powers conferred by this Act.” In several cases, victims’ families and their lawyers have argued that prosecuting civil offences such as murder or rape should not require sanction from the central government as such offences do not fall under the “exercise of the powers conferred” by the AFSPA (see Chapter 5). However, the army

and internal security forces have successfully countered that all acts must be considered done in “good faith” since security force personnel are constantly on active duty and under threat in “disturbed areas”.

The Armed Forces (Special Powers) Act - A history of challenges

In 1997, the constitutional validity of the AFSPA was challenged in the Supreme Court of India in the Naga People’s Movement of Human Rights vs. Union of India case.³⁹ The Court, after hearing petitions challenging it, all filed in the 1980s and early 90s, upheld the constitutional validity of the AFSPA, ruling that the powers given to the army were not “arbitrary” or “unreasonable.”⁴⁰ In doing so, however, the Court failed to consider India’s obligations under international law.

³⁸ Amnesty International India interview with Manoj Joshi, former defence correspondent for India Today, current fellow with the Observer Research Foundation in September 2014 in New Delhi.

³⁹ Supreme Court of India, Naga People’s Movement of Human Rights vs. Union of India, Writ Petition Nos. (C) Nos. 5328/80, 9229-30/82 Civil Appeals Nos. 721/85, 722/85, 723/85, 724/85, 2173-76/91, 2551/91 and Writ Petitions (C) Nos. 13644-45/84, Judgement dated 27 November 1997, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=13628> (accessed 9 April 2015). (Naga People’s Movement of Human Rights vs. Union of India).

⁴⁰ Naga People’s Movement of Human Rights vs. Union of India, judgement dated 27 November 1997, p.24

The Court further ruled that the declaration of an area as “disturbed” – a precondition for the application of the AFSPA - should be reviewed every six months. Concerning permission to prosecute, the Court ruled that the central government had to divulge reasons for denying sanction.⁴¹

In 2005, a committee headed by B P Jeevan Reddy, a former Supreme Court judge, which was formed by the Supreme Court to review the Armed Forces (Special Powers) Act, 1958 after the alleged rape and murder of Thangjam Manorama Devi in Imphal, Manipur by security forces, said in its report that the law had become “a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness.”⁴²

In 2012, a committee headed by J S Verma, a former Chief Justice of India, was established by the central government to review laws against sexual assault, following the gang-rape of a young woman in Delhi. The committee said that sexual violence against women by members of the armed forces or uniformed personnel should be brought under the purview of ordinary criminal law. To ensure this, the committee recommended the AFSPA be amended to remove the requirement of sanction to prosecute from the central government for prosecuting security force personnel for crimes involving violence against women.⁴³

In interviews with the media, J S Verma said that sexual violence could not in any way be associated with the performance of any official task, and therefore should not need permission to prosecute from the government.⁴⁴

Although new laws on violence against women were passed in April 2013, including the removal of the need for sanction to prosecute government officials for crimes involving violence against women, the recommended amendment to the AFSPA was ignored.⁴⁵

In January 2013, a commission headed by N Santosh Hegde, a former Supreme Court judge, was appointed by the Supreme Court in response to a public interest litigation seeking investigation into 1,528 cases of alleged extrajudicial executions committed in Manipur between 1978 and 2010. The Commission was established to determine whether six cases randomly chosen by the court were ‘encounter’ deaths – where security forces had fired in self-defence against members of armed groups – or extrajudicial executions. It was also mandated to evaluate the role of the security forces in Manipur.

⁴¹ Amnesty International, India: Briefing on the Armed Forces (Special Power) Act, 1958 (AI Index: ASA 20/025/2005), 9 May 2005, p.5, http://www.univie.ac.at/bimtor/dateien/india_ai_2005_briefing_on_armed_forces.pdf (accessed 9 April 2015). Official link was not available.

⁴² Report of the Committee to review the Armed Forces (Special Powers) Act, 1958, submitted to Ministry of Home Affairs, 2005, p.75. <http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf> (accessed 20 April 2015). Official link not available. Also see Amnesty International, India: The Armed Forces Special Powers Act: Time for a Renewed Debate on Human Rights and National Security (AI Index: ASA 20/042/2013), 8 November 2013, <http://www.amnesty.org.in/show/entry/briefing-afspa-time-for-a-renewed-debate-in-india-on-human-rights-and-natio/> (accessed 9 April 2015). (Amnesty International, India: The Armed Forces Special Powers Act: Time for a Renewed Debate on Human Rights and National Security).

⁴³ Report of the Committee on amendments to Criminal Law, 23 January 2013, pp. 149-151. <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf> (accessed 20 April 2015).

⁴⁴ “Your call with Justice (Retd.) J.S. Verma”, NDTV, 30 January 2013, <http://www.ndtv.com/article/india/your-call-with-justice-ret-d-js-verma-full-transcript-324315> (accessed 9 April 2015).

⁴⁵ Other official bodies have also recognized the plight of women in “disturbed” areas. In 2013, the Planning Commission in its 12th Five-year Plan stated, “Women in disturbed areas face special issues including continuous army presence, suspended civil rights and lack of normal access to facilities/services due to continuous violence. They are most vulnerable to atrocities and need special attention in areas like health care measures, schools, free legal aid and so on.” The Planning Commission went on to say that it would conduct a gendered review of the AFSPA and document human rights violations under the AFSPA as they relate to women, and perform a needs assessment of women in disturbed areas.

The Commission, whose report was submitted to the Supreme Court in April 2013, concluded that all the cases it had investigated involved “fake encounters” (staged extrajudicial executions). It also found that the AFSPA was widely abused by security forces in Manipur. Notably, it reported that only one request for sanction to prosecute a member of the Assam Rifles under Section 7 of the Act had been made since 1998.⁴⁶

The Justice Hegde Commission proposed that all cases of “encounters” resulting in death should be immediately investigated and reviewed every three months by a committee. It also recommended the establishment of a special court to expedite cases of extrajudicial killings within the criminal justice system, and that all future requests for sanction for prosecution from the central government be decided within three months, failing which sanction would be deemed to be granted by default.⁴⁷

In November 2014, the Vice-President of India in a speech noted that serious human rights violations – including extrajudicial executions, torture, and enforced disappearance – were particularly acute in areas such as Jammu and Kashmir. He stated that “serious complaints are frequently made about the misuse of laws like the Armed Forces (Special Powers) Act”, which “reflects poorly on the state and its agents.”⁴⁸

The AFSPA has also been subject recently to severe criticism by several independent United Nations human rights experts, including the Special Rapporteurs on violence against women; on extrajudicial, summary or arbitrary executions; and on the situation of human rights defenders.

Rashida Manjoo, the UN Special Rapporteur on violence against women, its causes and consequences, said in her official report to the UN Human Rights Council following her visit to India in April 2013 that the AFSPA “allows for the overriding of due process rights and nurtures a climate of impunity and a culture of both fear and resistance by citizens.” She called for the urgent repeal of the law.⁴⁹

Cristof Heyns, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, visited India in March 2012. In his report to the UN Human Rights Council, he stated that “the powers granted under AFSPA are in reality broader than that allowable under a state of emergency as the right to life may effectively be suspended under the Act and the safeguards applicable in a state of emergency are absent.

“Moreover, the widespread deployment of the military creates an environment in which the exception becomes the rule, and the use of lethal force is seen as the primary response to conflict.”⁵⁰ Calling for the repeal of the law,

⁴⁶ Report of the Supreme Court appointed commission, submitted to authorities on 30 March 2013, pp. 92-93. <https://humanrightsmipur.files.wordpress.com/2013/07/ejevfm.pdf> (accessed 20 April 2015). Official link not available.

⁴⁷ Recent Amnesty International publications such as “The Armed Forces Special Powers Act: Time for a Renewed Debate on National Security and Human Rights” and “Review Committee takes one step forward and two backwards”, (AI Index: ASA 20/031/2006), November 2006, <https://www.amnesty.org/en/documents/ASA20/031/2006/en/> (accessed 9 April 2015) highlight the role the AFSPA plays in facilitating impunity for security forces and shortcomings in India’s fulfilment of its international human rights obligations to provide effective remedy and access to justice for victims of human rights violations.

⁴⁸ Hamid Ansari, ‘Citizens and State Conduct’, Eighth V M Tarkunde Memorial Lecture, 21 November 2014. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=111666> (accessed 20 April 2015).

⁴⁹ Report of the Special Rapporteur on Violence against Women, its causes and consequences, Rashida Manjoo, Addendum: Mission to India (UN Doc A/HRC/26/38/Add.1), 1 April 2014, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-38-Add1_en.doc (accessed 9 April 2015).

⁵⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2013, p. 7, para. 27.

he said that “retaining a law such as AFSPA runs counter to the principles of democracy and human rights.”

Margaret Sekaggya, the UN Special Rapporteur on the situation of human rights defenders, who visited India in January 2011, also called for the AFSPA to be repealed in her report, and said that she was deeply disturbed by the large number of cases of defenders who claimed to have been targeted by the police and security forces under laws like the AFSPA.

On 14 November 2014, the former Minister of Home Affairs for India, P. Chidambaram, spoke out against AFSPA in the wake of two deaths by army firing in Budgam district a few days before, stating in media reports that the Ministry of Home Affairs had begun the process of amending the AFSPA in 2010, but were “stoutly resisted” by the Army authorities and Ministry of Defence.

“The AFSPA is an obnoxious law that has no place in a modern, civilized country. It purports to incorporate the principle of immunity against prosecution without previous sanction. In reality, it allows the Armed Forces and Central Armed Police Forces (CAPF) to act with impunity,” Chidambaram said.⁵¹

In May 2015, he wrote, “If there is one action that can bring about a dramatic change of outlook from Jammu and Kashmir to Manipur, it is the repeal of AFSPA, and its replacement by a more humane law.”⁵²

Legal provisions which facilitate immunity from prosecution for security forces also exist in other special legislation in force in Jammu and Kashmir, which extend the powers of the state to use force or detain individuals. For example, Section 22 of the Jammu and Kashmir Public Safety Act, 1978 provides a complete bar on criminal, civil or “any other legal proceedings...against any person for anything done or intended to be done in good faith in pursuance of the provisions of this Act.”⁵³

The requirement of sanction to prosecute police or security forces also exists in the ordinary criminal law. Section 197 of the Code of Criminal Procedure, 1973 provides that when a public servant is accused of any offence “alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction” of the Central Government or relevant State Government (depending who the public servant is employed by at the time). Section 197(2) specifically provides for the granting of sanction by the Central Government in relation to members of the armed forces. There are instances where the Ministry of Home Affairs has denied sanction to prosecute internal security force personnel under section 197(2) of the CrPC.

A similar clause exists within the Jammu and Kashmir Code of Criminal Procedure, 1989. Section 197(1) of the Code protects Jammu and Kashmir state police personnel from prosecution in civilian courts unless sanction

⁵¹ “P. Chidambaram calls AFSPA ‘obnoxious’; calls for amendments to the act” DNA India, 14 November 2014, <http://www.dnaindia.com/india/report-p-chidambaram-calls-afspa-obnoxious-calls-for-amendments-to-the-act-2035278> (accessed 9 April 2015).

⁵² P. Chidambaram, “Even to the causing of death”, The Indian Express, 3 May 2015, <http://indianexpress.com/article/opinion/columns/across-the-aisle-even-to-the-causing-of-death/> (accessed 20 May 2015).

⁵³ For a report on Amnesty International’s concerns about the Jammu and Kashmir Public Safety Act, see India: A ‘Lawless Law’, Detentions under the Jammu and Kashmir Public Safety Act, (AI Index: ASA 20/001/2011), 21 March 2011. <http://www.amnesty.org/en/library/info/ASA20/001/2011/en> (accessed 9 April 2015).

Section 197(2), Code of Criminal Procedure, 1973

No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

to prosecute is obtained from the Jammu and Kashmir Home Department.⁵⁴

4.2 CRIMINAL INVESTIGATION OF HUMAN RIGHTS VIOLATIONS

Criminal investigations by Jammu and Kashmir state police into human rights violations, as with other offences, are typically initiated by the registration of a case (filing of a First Information Report (FIR)) against security force personnel by the victim or the family.⁵⁵

Investigations are then conducted according to

normal procedure under the Jammu and Kashmir Code of Criminal Procedure, 1989 (similar to the Code of Criminal Procedure, 1973 operative in the rest of India).

A number of concerns exist about the registration of complaints and investigation of human rights violations by police in Jammu and Kashmir which are explored in more detail in Chapter 7.

4.3 CRIMINAL PROSECUTION OF HUMAN RIGHTS VIOLATIONS

While legal provisions protect members of the security forces from prosecution, ordinary criminal law also fails to specifically criminalize crimes under international law such as torture and enforced disappearance.

As the law does not specifically recognize the offence of ‘enforced disappearance,’ allegations of enforced disappearances are registered, according to First Information Reports (FIR) on record with Amnesty International India, under section 364 of the Ranbir Penal Code (RPC) – “Kidnapping or abducting in order to murder,” or section 346 – “Wrongful confinement in secret,” or section 365 – “Kidnapping or abducting with intent secretly and wrongfully to confine person.” Each of these provisions carry a sentence of imprisonment of seven to ten years.⁵⁶ Alleged extrajudicial executions, including deaths in custody, are typically registered under section 302 of the RPC – “murder”.⁵⁷

⁵⁴ Under Article 370 of the Indian Constitution, Jammu and Kashmir has retained a “special status” since 1947, which provides a level of autonomy to the state, including a separate constitution and set of laws that govern the state. Legislation passed by the central government of India must be approved by the Jammu and Kashmir state legislative assembly before it can be enforced in the state.

⁵⁵ Code of Criminal Procedure 1973, Section 154. Available at <http://www.icf.indianrailways.gov.in/uploads/files/CrPC.pdf> (accessed 17 April 2015).

⁵⁶ India has signed, but has not ratified the International Convention on the Protection of All Persons from Enforced Disappearance; if it were to become a state party to the Convention, it would be obligated to ensure that enforced disappearance constitutes an offence under its criminal law.

⁵⁷ Jammu and Kashmir is granted special status under Article 370 of the Indian Constitution, meaning that all legislation enacted by the Indian government must be confirmed by the Jammu and Kashmir state legislative assembly in order to become law in the state. In addition, Jammu and Kashmir has its own constitution, penal code (Ranbir Penal Code), code of criminal procedure, among other laws. However, the Ranbir Penal Code does not differ significantly from the Indian Penal Code.

Similarly, torture is currently not punishable as a specific offence under the RPC (or the Indian Penal Code). Allegations of torture are instead registered as “voluntarily causing hurt,” or “voluntarily causing grievous hurt.” The definitions of grievous hurt are not in line with the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which India signed in 1997 but has yet to ratify.⁵⁸ Proposals to further codify the crime of torture in a Prevention of Torture Bill, 2010, which lapsed in 2014, in any case fell short of the standard required under the Convention.⁵⁹

4.4 INDIA’S INTERNATIONAL OBLIGATIONS TO ENSURE TRUTH, JUSTICE AND REPARATION

Whenever serious human rights violations and abuses are committed (including torture, extrajudicial executions and enforced disappearances, which are crimes under international law and violations against the international community as a whole) States are obligated to ensure truth, justice and full reparation to victims.

These measures are not discretionary. They form part of the duty of all States to provide an effective remedy to victims as recognized in international human rights law and standards, including Article 8 of the Universal Declaration of Human Rights⁶⁰, The Basic Principles and Guideline on the Right to a Remedy and Reparation or Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁶¹, and Article 2(3) of the International Covenant on Civil and Political Rights⁶² (ICCPR), to which India is a state party.

The right to truth

Ensuring the right to know the truth about past human rights abuses – for victims, family members as well as the general public - is recognized in international human rights law as part of a state’s obligation to investigate and provide remedy for violations of human rights.

States must take measures to:

- establish the truth about human rights abuses, including their reasons, circumstances and conditions;
- the progress and results of any investigation;
- the identity of perpetrators, and in the event of death or enforced disappearance, the fate and whereabouts of the victims.

⁵⁸ Ranbir Penal Code, sections 320-326.

⁵⁹ The definition proposed in the 2010 bill failed to take into account practices of torture beyond those causing physical suffering. Further, a six-month deadline for making complaints about torture was proposed, and provisions requiring sanction to prosecute law enforcement officials and security forces remained intact in the proposed bill, allowing for the possibility of virtual immunity for perpetrating torture.

⁶⁰ Universal Declaration of Human Rights, Article 8. Available at <http://www.un.org/en/documents/udhr/> (accessed 17 April 2015).

⁶¹ The Basic Principles and Guideline on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (accessed 17 April 2015).

⁶² International Covenant on Civil and Political Rights, Article 2(3). Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 17 April 2015).

Truth is crucial in helping victims and their families understand what happened to them, counter misinformation, and highlight factors that led to abuses. It helps societies to understand why abuses were committed, so that they can prevent repetition.

The right to truth about human rights violations is recognized specifically in the International Convention on the Protection of All Persons from Enforced Disappearance, and increasingly recognized as integral to the rights to remedy and reparation under international law.

The Convention, which India signed in 2007 but is yet to ratify, recognizes the right to truth “regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”⁶³

The Human Rights Committee, a body of independent experts who monitor state compliance with the ICCPR, has stated that victims of all human rights violations must be allowed “... to find out the truth about those acts, to know who the perpetrators of such acts are and to obtain appropriate compensation.”⁶⁴ The Updated Set of Principles for the promotion and protection of human rights through action to combat impunity, which was adopted by the UN Commission on human rights in 2005, states: “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.”⁶⁵ The right has also been recognized by the Working Group on Enforced or Involuntary Disappearances⁶⁶ and the Office of the High Commissioner for Human Rights.⁶⁷

The UN Principles on Reparation establish that victims shall obtain satisfaction, “including verification of the facts and full and public disclosure of the truth.” The UN Human Rights Council⁶⁸ and the UN General⁶⁹ Assembly have also recognized in resolutions “the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.”

The right to truth entails the duty of the state to clarify and disclose the truth about gross human rights violations not only to victims and their relatives, but also to society as a whole. The right to truth cannot be

⁶³ Convention on the Protection of All Persons from Enforced Disappearance, Article 24(2). Available at <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx> (accessed 17 April 2015).

⁶⁴ Human Rights Committee, Concluding observations of the Human Rights Committee on Guatemala (UN Doc. CCPR/C/79/Add.63), 3 April 1996, p. 5, para. 25, <http://www.refworld.org/docid/3ae6b0290.html> (accessed 9 April 2015).

⁶⁵ United Nations, Commission on Human Rights. Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), Principle 2, <http://www1.umn.edu/humanrts/instree/HR-protection2005.html> (accessed 17 April 2015).

⁶⁶ Report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1999/62), 28 December 1998, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/053/10/IMG/G9805310.pdf?OpenElement> (accessed 9 April 2015).

⁶⁷ Report of the Office of the United Nations High Commissioner for Human Rights: Study on the right to the truth (E/CN.4/2006/91), 8 February 2006, p.4, para 4, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf?OpenElement> (accessed 9 April 2015).

⁶⁸ Resolution adopted by the Human Rights Council on the Right to Truth (A/HRC/RES/12/12), 12 October 2009, p. 3, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G09/165/99/PDF/G0916599.pdf?OpenElement> (accessed 17 April 2015).

⁶⁹ Resolution adopted by the UN General Assembly on the Right to Truth (A/RES/68/165), 21 January 2014, p. 3, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/165 (accessed 9 April 2015).

separated from the right to justice.⁷⁰

The right to remedy

The right to a remedy is recognised in virtually all major international human rights treaties, including the International Covenant on Civil and Political Rights, to which India is a state party.

The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law clarify that remedies include:

- equal and effective access to justice;
- adequate, effective and prompt reparation for harm suffered and
- access to relevant information concerning violations and reparation mechanisms.⁷¹

International law requires that remedies not only be available in law, but accessible and effective in practice.

The right to reparation

Victims of human rights abuses, including crimes under international law, have a right to full and effective reparation. The right to reparation includes restitution, rehabilitation, satisfaction and guarantees of non-repetition. Reparation should seek to “as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁷²

⁷⁰ Revised final report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political) (E/CN.4/Sub.2/1997/20/Rev.1), 2 October 1997, paras. 17 and 26, http://www1.umn.edu/humanrts/demo/RightsofDetainees_Joinet.pdf (accessed 9 April 2015). Official link was not available.

⁷¹ Resolution adopted by the General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN doc A/RES/60/147), 21 March 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> (accessed 9 April 2015).

⁷² Resolution adopted by the General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, para 19-23.

5. SANCTION

5.1 EVIDENCE OF THE USE OF SANCTION PROVISIONS

The requirement of sanction for prosecution is a colonial-era provision designed to protect then-largely British public servants from unnecessary and frivolous litigation. In practice it has led to impunity for serious human rights violations. While acknowledging that “civilians” have been killed by security forces, the Army has been known to publicly dismiss complaints of human rights violations and label the families and human rights activists who have brought them as “vested” or “motivated” by anti-national interests.⁷³

Authorities maintain that sanction provisions are necessary to prevent the filing of false cases against security force personnel by militant or terrorist groups. This refusal to acknowledge the legitimacy of complaints against the security forces is also reflected in the government’s blanket denial of sanction for members of the security forces to be prosecuted in civilian courts.

This report documents several individual cases of victims and their families denied justice through the sanction process. Information made available to Amnesty International India indicates that since 1990, the Ministry of Defence (MoD) has denied, or kept pending, all applications seeking sanction to prosecute army personnel for alleged human rights violations in civilian courts.

Sanction provisions violate India’s obligations under international law to prosecute and punish perpetrators of gross human rights violations, to combat impunity and uphold fair trial standards and maintain equality before the law.

5.1.1 REQUESTS FOR SANCTION MADE TO THE MINISTRY OF DEFENCE

Due to the lack of transparency around the process of seeking sanction, there is some confusion as to the exact number of cases in which the MoD has received applications seeking sanction. According to a Ministry of Defence response dated 18 April 2012 to an application filed under the Right to Information Act, 2005 by activists in J&K, the MoD had received 44 applications seeking sanction to prosecute army personnel for criminal offences committed in Jammu and Kashmir since 1990.⁷⁴ The document indicated that sanction had been denied in 35 cases as of 3 April 2012 (it said that in one case, a court-martial had been conducted leading to conviction, dismissal from service and a sentence of rigorous imprisonment), while nine cases remained under consideration.⁷⁵ Amnesty International India filed another application on 20 June 2013 requesting updated information on sanction applications to the MoD under the RTI Act. The MoD stated in its response that it had received 44 applications seeking sanction to prosecute, but declined to release the details

⁷³ Northern Army and Human Rights, Section 16.

⁷⁴ Copy of RTI response 18 April 2012 provided to Amnesty International India by JKCCS in September 2013. (RTI response dated 18 April 2012)

⁷⁵ RTI response dated 18 April 2012.

of those cases, or the status of the applications.⁷⁶

Significant discrepancies exist between the information provided by the Ministry of Defence and data provided by the Jammu and Kashmir State Home Department in 2012 and 2013. In 2012, the Jammu and Kashmir Coalition for Civil Society obtained a list of 46 cases from the Jammu and Kashmir State Home Department through the RTI Act that had been sent to the Ministry of Defence since 1990 seeking permission to prosecute.⁷⁷ The Ministry of Defence stated in an affidavit to the Jammu and Kashmir High Court in 2008 that it had not received 27 of the 46 cases that the Jammu and Kashmir State Home Department listed as sent to the Ministry. To date, the whereabouts and status of these 27 sanction applications are unknown.⁷⁸

To Amnesty International India’s knowledge, there have been no concerted efforts made to locate these cases or investigate these discrepancies. The MoD also reported that it had received 16 other cases that are not in the records of the Jammu and Kashmir State Government.⁷⁹ In total, the MoD stated that it received 35 cases seeking sanction to prosecute between 1990 and 2007.

By Amnesty International India’s estimation, closer to 70 applications for sanction have been forwarded to the Ministry of Defence by the state government since 1990, some of which appear to have been lost between the Jammu and Kashmir State Home Department and the Ministry of Defence, and others that are not found in the Home Department’s records, but appear in the records of the Ministry of Defence.⁸⁰

Further, many details recorded in the applications forwarded for approval of sanction to the Ministry of Defence are wrong, including incorrect First Information Report numbers, names and dates of incidents, as well as incomplete information concerning the accused.

In 2013, the Jammu and Kashmir State Home Department stated in response to an RTI application filed by Amnesty International India that it had forwarded 39 cases for sanction to the Ministry of Defence since 1990, but declined to reveal the details of each case. Thus, cross-referencing the lists from 2012 and 2013 was not possible.

⁷⁶ RTI response dated 19 August 2013 vide letter No. A/810027/RTI/13578 from Integrated Service Headquarters, Army and Ministry of Defence. On 24 February 2015, the Minister of Defence stated in Parliament that the MoD had received 38 requests for sanction from 16 June 1991. He said that sanction had been denied in 30 cases, and 8 cases were still pending. Of the pending cases, six were from Jammu and Kashmir, including one from as far back as 1993. See Question No. 59, Answered on 24 February 2015, Session No. 234, Rajya Sabha. Available in Hindi at <http://164.100.47.234/question/qhindi/234/Au59.docx> (last accessed 25 April 2015).

⁷⁷ Seven of these cases appear to pertain to the Ministry of Home Affairs, since they involved other security force personnel, including central reserve and border police forces, but were instead sent to the Ministry of Defence.

⁷⁸ Jammu and Kashmir High Court, Ghulam Nabi Magray vs. Union of India & Ors., Response filed by Ministry of Defence “Affidavit filed in compliance of order dated 22 December 2008 and dated 22 February 2008”, 5 June 2009, Annexures A and B. Copies provided to Amnesty International by JKCCS in September 2013. (Jammu and Kashmir High Court, Ghulam Nabi Magray vs. Union of India & Ors., Response filed by Ministry of Defence, 5 June 2009).

⁷⁹ Response to RTI application (dated 22 February 2011) vide letter No. 23(03)/2012-D (AG) from the Ministry of Defence dated 10 January 2012. (RTI response dated 10 January 2012)

⁸⁰ Amnesty International India compared a list of applications sent to the Ministry of Home Affairs and the Ministry of Defence from the J&K State Home Department between 1990 and 2011, a list of cases received by the MoD between 2007 and 2011, two lists of cases listed as received and not received by the MoD from 1990 to 2007, and a list of cases received by the MoD between 2005 and 2009, some of which are found in the Home Department’s records, and others not. By cross-referencing the lists, Amnesty International India’s estimate is that approximately 70-71 unique cases should have been received by the MoD between 1990 and 2012, and 16-17 cases by the Ministry of Home Affairs. All lists were obtained by the Jammu and Kashmir Coalition for Civil Society through Right to Information applications filed between 2010 and 2012. Copies were provided to Amnesty International India in September 2013.



Justification for the denial of sanction

In a separate RTI response dated 10 January 2012, the Ministry of Defence (MoD) provided information on the reason for denial of sanction in 19 cases.⁸¹ In one case relating to a request to prosecute a member of the army for the alleged rape and sexual assault of two women in Anantnag district in 1997, the MoD stated, “there were a number of inconsistencies in the statements of witnesses. The allegation was lodged by the wife of a dreaded Hizbul Mujahideen militant. The lady was forced to lodge a false allegation by ANE’s [anti-national elements] army.”

This is one example of the Ministry of Defence summarily dismissing a criminal investigation carried out by the police into a complaint of human rights violations in Jammu and Kashmir. This approach - utilising legal protections for members of the security forces to deny criminal prosecution in civilian courts and either dismissing the allegations outright or conducting its own “court of inquiry” - almost invariably results in the ultimate dismissal of the allegations and violates the right to justice and equality before the law.⁸²

5.1.2 REQUESTS FOR SANCTION MADE TO THE MINISTRY OF HOME AFFAIRS

The Ministry of Home Affairs, which is vested with the authority to grant sanction for prosecution of members of internal security forces like the BSF and CRPF, has refused to disclose information about the number of requests it has received for sanction and the decisions made on those requests, despite multiple applications under the RTI Act in recent years. The Jammu and Kashmir State government told human rights activists in 2013 that it had forwarded 29 applications for sanction to prosecute members of the internal security forces to the Ministry of Home Affairs since 1990, but this figure is impossible to verify.

In response to RTI applications seeking this information from internal security forces directly, the Central Reserve Police Force and Border Security Force both claimed exemption under section 24(1) of the RTI Act, 2005 which provides that “nothing in this Act shall apply to the intelligence or security organizations... being organizations established by the Central Government... provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section”. They argued that “there appears to be no human rights violation/corruption. Further, there is no public interest to disclose such type of information or documents.”⁸³

⁸¹ Information provided by the Government of India in response to RTI request submitted by JKCSS on 22 February 2011. Copies of RTI responses were provided to Amnesty International India by JKCSS in September 2013.

⁸² According to an affidavit filed by the MoD before the Jammu and Kashmir High Court in 2009, allegations against army personnel “necessitate holding of detailed Court of Inquiry by Army to fix culpability or otherwise in each case. Since cases are generally of very old vintage, marshalling of evidence in any given case requires enormous efforts and time depending upon availability of witnesses and documents held with various civil agencies”.

⁸³ Response to RTI application filed on 25 and 28 June 2013 dated August 2013 vide letter no. M-V-528/2013-Adm.I/RTI from the Directorate General, CRPF, CGO Complex, Lodhi Road, New Delhi (Ministry of Home Affairs). Identical answers were received from the Border Security Force Headquarters in Delhi.

5.1.3 REQUESTS FOR SANCTION MADE TO THE JAMMU AND KASHMIR STATE GOVERNMENT

The Jammu and Kashmir state government failed to respond to applications filed under the Jammu and Kashmir Right to Information Act, 2009 in June 2013 requesting details about the number of sanction applications it had received in relation to police personnel suspected of committing human rights violations. However, an affidavit filed by the Jammu and Kashmir Home Department in 2008 before the Jammu and Kashmir High Court stated that out of 458 cases seeking permission to prosecute army, internal security forces and Jammu and Kashmir state police for corruption and other offences from 1990 to 2007, the state government appeared to have granted permission to prosecute police personnel in up to 60 percent of applications received by them. However, the affidavit did not provide separate figures for human rights violations and corruption cases.⁸⁴

The additional law secretary for the Jammu and Kashmir Law Department told Amnesty International in February 2014 that his department receives between 20-25 cases every year in which the Jammu and Kashmir Home Department has granted sanction to prosecute police personnel for criminal offences, including human rights violations, under section 197(1) of the Jammu and Kashmir CrPC. However, he said that he was unaware of the total number of sanction requests that the Home Department receives, as the Law Department only receives applications that have been granted sanction. Apart from these, he said that the Law Department also receives an average of 25 - 30 cases annually under section 5 of the Prevention of Corruption Act, where sanction to prosecute has been granted.

5.2 THE SANCTION PROCESS

Neither the Armed Forces Special Powers Act nor the Code of Criminal Procedure prescribe a specific process for government authorities to follow to seek sanction for prosecution. Letters from Amnesty International India to the Ministry of Home Affairs and Ministry of Defence, as well as official requests for meetings to seek further information on the sanction process at the central level, went unanswered. However, officials at the Jammu and Kashmir State Human Rights Commission and in the Jammu and Kashmir Law Department described the process to Amnesty International India during interviews conducted in the state in 2013.

The sanction application process works slightly differently for members of the army and internal security forces, and the Jammu and Kashmir state police. When investigations into a criminal complaint against a member of the police or security forces are complete, the investigating authority, usually a member of the Jammu and Kashmir state police, is responsible for forwarding the established charges and any supplementary information to the Director General of Police, Jammu and Kashmir. The case is reviewed at the police headquarters by the Director Prosecution, and confirmed by the Director General of Police before being forwarded to the Jammu and Kashmir Home Department. The Director Prosecution has the prerogative to send the case back to the

⁸⁴ The Jammu and Kashmir Coalition for Civil Society obtained a copy of the affidavit through the Right to Information Act and provided a copy to Amnesty International in September 2013.

investigating officer if they feel the report is incomplete, or requires clarification.

If the accused is a member of the Army or internal security forces, the Jammu and Kashmir Home Department forwards the case to the central government for sanction (Ministry of Defence for the Army and Ministry of Home Affairs for the internal security forces). If the accused is a member of the Jammu and Kashmir State Police, the Jammu and Kashmir Home Department itself decides on whether sanction should be granted. According to information made available through the Right to Information Act, the MoD has taken anywhere from a few months to almost ten years to deny sanction to prosecute.

In an affidavit filed by the MoD in the Jammu and Kashmir High Court in 2008, the Joint Secretary for Defence replied to questions posed by the court regarding cases being processed for sanction, including the causes of delay in disposing of cases, and the estimated time the MoD would take to issue decisions in pending cases.

The affidavit provides some scant details on the sanction evaluation process: the case is received by the Integrated Service Headquarters – a separate department in the MoD comprised of staff from the Indian Army Headquarters and Ministry of Defence - for their “verification and comments.” The verification process is not detailed in the affidavit. After review by the Integrated Service Headquarters, consideration is given “on its merit whether the offence is proved and also whether it was committed while acting or purporting to act in the in discharge of official duties cast upon service personnel in the disturbed area”. The affidavit goes on to say that, “A decision is accordingly taken by the Ministry of Defence or the Ministry of Home Affairs whether or not to grant permission to prosecute in a civilian court.”⁸⁵

The affidavit also records that Courts of Inquiry – or military investigations - are held into each case received by the MoD. In the cases where reasons for denial of sanction to prosecute have been provided by the MoD, it is apparent that these Courts of Inquiry (concerns about which are discussed in Chapter 6 below) can contradict the findings of criminal investigations, leading to the denial of sanction and dismissal of the charges.

In its affidavit, the Ministry of Defence justified delays in evaluating sanction applications by pointing to the often long delay in criminal investigations by state police, in some cases of “up to 14-15 years for the police to conclude the investigation and seek permission from the central government to prosecute.” The Ministry of Defence stated that records, including police case diaries, forwarded in the sanction applications were often incomplete and/or illegible causing delay for officials attempting to fill incomplete details in a case with “proper application of mind.” Further, the MoD stated that by the time such applications for sanction were received by the central government, often the individuals and units involved in the alleged incidents were “moved/posted out long back making the process of identifying the individuals and records cumbersome and time consuming.”

Police investigations in Jammu and Kashmir have indeed been slow in many cases of alleged human rights

⁸⁵ Jammu and Kashmir High Court, Ghulam Nabi Magray vs. Union of India & Ors., OWP 1842/2008, Affidavit filed 22 December 2008 by Ministry of Defence. Copy on file with Amnesty International India.

violations by security force personnel, in some cases lasting more than a decade. This is often caused by the refusal of security forces to cooperate with criminal investigations, their non-compliance with court orders and refusal to produce accused personnel for questioning (documented in Chapter 7 below). Even in those cases in which the sanction application was received following police investigation within a year of the alleged violation, the MoD has failed to issue a prompt decision on sanction in the majority of cases: several cases have been under consideration for more than eight years without a decision.



5.3 LACK OF TRANSPARENCY

Not a single family interviewed by Amnesty International India for this report had been directly informed by the authorities of the status or outcome of a sanction request in relation to their case. As the procedure for deciding on whether sanction should be granted is not prescribed in law, there are no specific legal requirements to ensure that victims or their families are informed of the status or decision on sanction to prosecute in their cases.

The majority of victims' family members interviewed by Amnesty International India in Jammu and Kashmir were unaware even of the requirement for sanction under the AFSPA and the ordinary criminal law, and whether their relative's case had even been forwarded for sanction. Often, families mistakenly believed that the criminal case had been closed.

In 1999, the National Human Rights Commission issued a letter to all Directors General of Police in India on measures to help improve the relationship between the police and public. According to these guidelines, if an investigation of a case is not completed within three months, the complainant or victim is entitled to be informed in writing by the investigating officer of the reasons for the delay, and to be subsequently updated at three-month intervals. Among the reasons listed is the “non-receipt of prosecution sanction.”⁸⁶

The lack of transparency in the sanction process, and the authorities' failure to inform families of the status or nature of the decision of the central government regarding sanction partly accounts for the low number of legal challenges to the denial of sanction to prosecute (see below). This is despite the fact that in 1997, when upholding the constitutionality of the AFSPA, the Supreme Court clarified that decisions on sanction were subject to judicial review.⁸⁷

⁸⁶ National Human Rights Commission, “Need for the investigating agencies to keep the complainants/victims informed of the progress of investigation” Measures to Improve Police-Public Relationship and Confidence, 22 December 1999, p.75, section II(c)(e) & (f), <http://nhrc.nic.in/Documents/sec-4.pdf> (accessed 10 April 2015).

⁸⁷ Naga People's Movement of Human Rights vs. Union of India, judgement dated 27 November 1997.

5.4 CHALLENGES TO DECISIONS ON SANCTION

All of the 58 families interviewed by Amnesty International India said they had little or no faith that those responsible for human rights violations will be brought to justice, given the lack of accountability for security forces in Jammu and Kashmir over the past two decades. Due to the secrecy surrounding the sanction decision process, families are rarely, if ever, informed of sanction decisions issued by the authorities, and therefore are unable to challenge sanction denials. However, in a few cases, families have been able to challenge the denial of sanction. Their hope, they said, is that justice in their cases will help prevent others from becoming victims of human rights violations in the future.

Three families have directly challenged the decision of the MoD to deny sanction for prosecution in recent years: that of Manzoor Ahmad Mir, who was subjected to an enforced disappearance in 2003 and believed to have been extrajudicially executed; Ashiq Hussain Ganai, who was allegedly tortured to death in custody in 1993; and Javaid Ahmad Magray, who was allegedly extrajudicially executed in 2003 (case discussed in Chapter 1).

In 2011, the family of Manzoor Ahmad Mir filed a petition in the Jammu and Kashmir High Court challenging the MoD's decision to deny sanction to prosecute a Captain in the Army for Manzoor's abduction and apparent murder in September 2003.⁸⁸ The MoD's decision was challenged on the grounds that it was arbitrary and a violation of Article 14 of the Indian Constitution (equality and equal protection before the law). To date, the Union of India has failed to file a response to the petition in the High Court. On 23 June 2015 the family's lawyer informed Amnesty International India that the case had not been listed for hearing before the High Court for several months.⁸⁹

In 2003, the police filed charges of murder, kidnapping, evidence tampering and common intent against a Captain in the 23rd Rashtriya Rifles and two local informers, following an investigation into the disappearance of Manzoor Ahmad Mir. In a letter dated 9 May 2013, the Deputy Commissioner in Baramulla wrote to the Principal Secretary, Home Department, seeking permission to declare Manzoor Ahmad Mir “dead” and for benefits to be issued to his surviving family. He stated in the letter that: “The investigation indicates that the subject [Manzoor Ahmad Mir] was picked up by the above mentioned accused Army officer and his associates who killed him during interrogation and destroyed his dead body to save their skin for which section 201 of RPC (evidence tampering) was added. The report of the Inspector General of Police CID Jammu and Kashmir...reveals that on 7 September 2003, the accused Army officer...along with two civilian informers resident of Delina, Baramulla, searched his house, picked up the victim and since then his whereabouts are not known.”⁹⁰

⁸⁸ JKCCS provided a copy of First Information Report to Amnesty International India in September 2013.

⁸⁹ Phone communication to Amnesty International India dated 23 June 2015

⁹⁰ Letter from the Deputy Commissioner, Baramulla to the Principal Secretary to Government, Home Department Jammu and Kashmir. No. DCB/SHRC/03/03 dated 9 May 2013. Subject: Missing case of Manzoor Ahmad Mir.

The Army claimed protection for the accused Army Captain under Section 7 of the AFSPA stating that “no proceedings can take place against the accused till necessary prosecution sanction is obtained” from the Ministry of Defence.⁹¹ Based on this statement, the local judicial magistrate in Baramulla refused to take cognizance of the charges on 31 August 2005 until the Central Government granted sanction in the case. Manzoor Ahmad Mir’s family filed a petition challenging the order of the judicial magistrate before the Jammu and Kashmir High Court. On 21 April 2007, the High Court stated that the Magistrate “should not have acted on the application of the Army, as the Army was not a party before the court at all.”⁹²

The Ministry of Defence denied sanction in the case on 23 February 2009, justifying its decision on the grounds that “the allegation was motivated by vested interests to malign the image of security forces. Neither any operation was carried by any unit in the area nor was any person arrested as alleged.”⁹³

In an interview with Amnesty International India, Bashir Ahmad Mir, Manzoor Ahmad Mir’s brother said, “The whole system is corrupt. We are fighting for the guilty to be put behind bars, but it is impossible... The main aim is that the guilty should be punished so that no one else has to suffer this.”⁹⁴

In the case of Ashiq Hussain Ganai, who was allegedly tortured and killed by the army in 1993, the Ministry of Defence denied sanction to prosecute in 1997 without providing any reasons for their denial.⁹⁵ On 14 May 1999, the family filed a writ petition before the Jammu and Kashmir High Court challenging the denial of sanction to prosecute the two army personnel identified by the police investigation. Multiple court adjournments followed, and the Jammu and Kashmir High Court granted further time to the central government to respond. The most



recent court order available is dated 20 November 2006, in which the High Court granted further time to the Union of India to submit a response to the challenge. No further action is known to have been taken.

⁹¹ Argument challenged in petition OWP 1091/2011, a copy of which was provided to Amnesty International by JKCCS in September 2013.

⁹² Argument challenged in petition OWP 1091/2011, a copy of which was provided to Amnesty International by JKCCS in September 2013.

⁹³ Copy of RTI response on file with Amnesty International India provided by JKCCS in September 2013.

⁹⁴ Interview with Amnesty International India on 21 November 2013.

⁹⁵ Letter from the Jammu and Kashmir Home Department to the Director General of Police, “Accord of sanction” from the Ministry of Defence [No. Home/82/95-ISA (G)], 8 July 1997. “The central government (Ministry of Defence) after due examination and consideration of the facts and the circumstances of this case have decided not to grant the sanction to prosecute...” Copy of letter provided to Amnesty International by the family of the victim on 23 November 2013.

5.5 CHALLENGES TO THE APPLICABILITY OF SANCTION PROVISIONS

Section 7 of the AFSPA or similar provisions that require sanction for prosecution should not be allowed to be invoked by the security forces in cases where human rights violations have been alleged. Sanction provisions, under law, only apply to acts committed during the course of official duties, or for “anything done or purported to be done in exercise of the powers conferred” by the AFSPA.”⁹⁶ Murder, rape and other offences amounting to human rights violations cannot be considered under any circumstances as having been carried out during the course of official duty. In a number of cases, families and lawyers have sought to make such arguments before authorities and courts. Even investigative agencies such as the Central Bureau of Investigation have similarly argued that the intentional killing of civilians cannot be protected by immunity provisions in existing legislation as any such action could not be considered an official act.⁹⁷ Trial courts in Jammu and Kashmir have made similar observations (see Machil case below).

Two high-profile cases invoking this argument have reached the Supreme Court of India. A counsel for the Union of India, and former counsel for the Army in Jammu and Kashmir, speaking under condition of anonymity said: “There are just a few of these cases that have gone to the Supreme Court, but if you went to each of the [lower courts] in Jammu and Kashmir, you would find dozens, if not hundreds, of records in which the security forces just take the cases back into their own courts, and the families don’t have the resources to

fight it.”⁹⁸

The Pathribal Case

“The night they took my father, I was sleeping upstairs. I remember hearing the army personnel barge in and ask for someone to show them the way through the fields. My father was not very well, so I ran downstairs and offered to show them. But the army officer said: ‘No, don’t take him, the children are too young. Take the father.’” Abdul Rasheed Khan, son of Juma Khan, who was allegedly killed in an extrajudicial execution in 2000⁹⁹

Abdul Rasheed Khan’s father Juma Khan was one of five alleged “militants” who were allegedly extrajudicially executed near Pathribal village on 25 March 2000 by personnel of the 7 Rashtriya Rifles in a staged “encounter”, and whose bodies were subsequently buried in a forest nearby.

⁹⁶ Examination of India’s Second Periodic Report to the Human Rights Committee (UN Doc. CCPR/C/SR.1042), 26 March 1991, para 16. Mr Lallah comments on Section 6 of the AFSPA: “Purported is the dangerous thing because anyone killing anybody can say ‘Well I thought I was performing my functions’. It is a highly dangerous [word] when one is dealing with the right to life. I sincerely hope, Attorney General that you will bring this to the attention of the government. True, there are disturbed areas but people also live in disturbed areas and not everyone causes disturbance in a disturbed area.”

⁹⁷ See Supreme Court of India, *State of Jammu and Kashmir vs. Lakhwinder Kumar*, Criminal Appeal No. 624/2013 and 625/2013, Judgement dated 25 April 2013, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=40332> (accessed 9 April 2015) (*State of Jammu and Kashmir vs. Lakhwinder Kumar*, Judgement dated 25 April 2013); *General Officer Commanding vs. Central Bureau of Investigation*, Criminal Appeal No. 257 of 2011 ([2012] 5 S.C.R. 599), 1 May 2012, http://supremecourtindia.nic.in/scr/2012_v5_pi11.pdf (accessed 10 April 2015). (*General Officer Commanding vs. Central Bureau of Investigation* ([2012] 5 S.C.R. 599), 1 May 2012.)

⁹⁸ Interview with Amnesty International India on 7 September 2013 in Jammu and Kashmir.

⁹⁹ Interview with Amnesty International India on 24 January 2014 over phone.

The Central Bureau of Investigation (CBI) – India’s premier investigating agency - which initially investigated the killings (including identifying the buried bodies through forensic tests and subsequently establishing that the individuals killed were not associated with militancy) said the incident was ‘cold-blooded murder’. In 2006 they charged five soldiers with offences including criminal conspiracy, murder and kidnapping.

Utilising Section 7 of the Armed Forces Special Powers Act, the army blocked prosecution, arguing that the case required government sanction under the AFSPA. The Supreme Court upheld the requirement that no criminal proceeding could be initiated against army personnel without the central government’s permission and gave the army the option of handing over the accused army personnel to the civilian courts, or trying them by court-martial. The Court clearly stated, “in case the option is made to try the case by a court-martial, the said proceedings would commence immediately and would be concluded strictly in accordance with law expeditiously.”¹⁰⁰

The army initially appeared reluctant to try the case in a military court. In January 2012, according to press reports, the Additional Solicitor General, P.P. Malhotra, told the Supreme Court that the Army was not interested in bringing the officers to a court martial under the Army Act. “We cannot take over the case,” Mr. Malhotra said. “The Armed Forces are bound to protect their men.”¹⁰¹ One of the Supreme Court justices on the two-judge bench, Swatanter Kumar, told Malhotra, “You [the Army] don’t want to take over the case and initiate court martial proceedings against them. You don’t allow the criminal justice system to go ahead.”¹⁰² Justice Chauhan, the second member of the two-judge bench, also expressed concern: “The victims cannot be remedy-less. No person can be harassed. No jawaan (soldier) should exceed limits. You cannot interpret and misinterpret the law and expect citizens to wait.”

The army ultimately chose to handle the case within the military justice system¹⁰³ and announced that it would begin proceedings on 20 September 2012.¹⁰⁴ On 24 January 2014, nearly 18 months after the Supreme Court order, army authorities dismissed the charges against the five accused personnel citing “lack of evidence.” Abdul Rasheed Khan told Amnesty International India that none of the families were informed directly by the army of the outcome of the military proceedings, but only learnt of the development on 24 January 2014 when the army’s dismissal was reported by the media.¹⁰⁵

According to the closure report filed before the Chief Judicial Magistrate in Srinagar, the army never conducted

¹⁰⁰ General Officer Commanding vs. Central Bureau of Investigation ([2012] 5 S.C.R. 599), 1 May 2012, p. 617, para 7(II).

¹⁰¹ “Supreme Court pulls up Army in Pathribal encounter case”, The Hindu, 25 January 2012, <http://www.thehindu.com/news/national/supreme-court-pulls-up-army-in-pathribal-encounter-case/article2828773.ece?ref=relatedNews> (accessed 9 April 2015). (“Supreme Court pulls up Army in Pathribal encounter case”, The Hindu, 25 January 2012)

¹⁰² “Supreme Court pulls up Army in Pathribal encounter case”, The Hindu, 25 January 2012.

¹⁰³ “Court martial begins in Pathribal encounter case” The Hindu, 22 September 2012 <http://www.thehindu.com/todays-paper/tp-national/court-martial-begins-in-pathribal-encounter-case/article3924714.ece> (accessed 9 April 2015). (“Court martial begins in Pathribal encounter case” The Hindu, 22 September 2012).

¹⁰⁴ “Court martial begins in Pathribal encounter case” The Hindu, 22 September 2012.

¹⁰⁵ Amnesty International India interview with Abdul Rasheed Khan, the son of one of the victims, by phone on 24 January 2014.

a trial.¹⁰⁶ Instead, the army dismissed the case under Rule 24 of the Army Rules, 1954 after a pre-trial procedure called the summary of evidence (see below for description of this process). There is no apparent possibility for the victims’ families to appeal or review the decision reached through the military justice system. The CBI report is not available in the public domain. Despite several attempts—including talking to the lead investigator on the case for the CBI and the defence counsel—Amnesty International India was unable to obtain a copy of the report.

THE ZAHID FAROOQ SHEIKH CASE

“We will fight as long as we can. As long as the courts allow us to appeal, we will appeal over and over again, even if it takes another decade.”

Farooq Sheikh, father of 16-year-old Zahid Farooq Sheikh, who was killed by security forces in 2010.

Just a year after the Supreme Court granted the army permission to try its personnel by a court martial in the Pathribal case, in April 2013, the Supreme Court again granted security forces the option to try their own personnel: this time the Border Security Force. 16-year-old Zahid Farooq Sheikh was killed in 2010 by the Border Security Force personnel as he was walking home from playing cricket with friends in Srinagar.¹⁰⁷

Unlike many past cases of alleged human rights violations, the state police investigation into Zahid’s killing was



conducted swiftly, and within a few weeks of the incident, the police filed charges of murder against two BSF personnel. The BSF did not deny that their soldiers were responsible for Zahid’s death, and began conducting security force court proceedings against the accused after the conclusion of the police investigations, arguing that because their personnel are always considered on “active duty” in a state designated as “disturbed,” they were empowered to try their personnel in a military court.

Zahid’s father, Farooq Sheikh and his family petitioned to have the case tried in a civilian court as they were not convinced they would get justice from the security forces. “We

¹⁰⁶ Copy provided to Amnesty International India by the Jammu and Kashmir Coalition for Civil Society on 26 January 2014.

¹⁰⁷ (State of Jammu and Kashmir vs. Lakhwinder Kumar, Judgement dated 25 April 2013). The Supreme Court in its judgement noted that the Commandant of the 68th Battalion of the Force “...accompanied by other Force personnel, ...got stuck in a traffic jam. This led to a verbal duel with some boys present at Boulevard Road, Brain, Srinagar. The verbal duel took an ugly turn and the Force personnel started chasing the boys. It is alleged that... (a constable) fired twice and one of the rounds hit Zahid Farooq Sheikh. Zahid died of the fire arm injury instantaneously.”

¹⁰⁸ Amnesty International India interview with Farooq Ahmad Sheikh, Srinagar, Jammu and Kashmir on 24 September 2013.

are not told anything when they conduct a trial. We don't have access to any information. How will we know that the guilty are even punished? The only way we can be sure is to have the trial in the civil court”, said Farooq Sheikh.¹⁰⁸

In March 2013 Farooq Sheikh was called to testify before the BSF Security Force Court. Farooq says the BSF summoned him several times through the local police, but he was reluctant to attend the proceedings as they were held at the BSF camp at Panthachowk in Srinagar, which only military personnel are usually allowed to enter. He said he felt nervous about entering the BSF premises, and feared intimidation or harassment.

Farooq said that he and another witness, Mushtaq Wani, who was with Zahid when he was killed, went to testify before the Security Force Court, also in March 2013. The BSF had appointed a lawyer for them, who Farooq says was from Jammu. Farooq said, “They repeatedly tried to discredit Mushtaq. They repeatedly projected the incident as if there was stone-pelting at the time. But the police have made official reports that everything was normal at that time. No stone-pelting was going on...The cross-examination was done by a soldier who questioned Mushtaq and kept accusing him of being a militant, asking him about his activities and whereabouts.”

Farooq told Amnesty International India that he did not trust the BSF court proceedings. At the hearing, Farooq says that there were 14 other witnesses produced by the local police and witnesses from the BSF side. When he went to testify, he says, a senior officer of the unit fell at his feet and said, “Please forgive me, we have made a mistake.” Farooq replied, “How can I forgive you. You have killed an innocent boy.”

Zahid's cousin, Nasir Sheikh added: “They [the BSF] will complete the investigation and trial, they have just one or two more witnesses to depose before the court, and then most probably the accused will be transferred to another place, and we will never know what comes of the case. Just like in the Pathribal case, the BSF are saying that there were no eyewitnesses to the incident so they cannot charge the accused with murder.”¹⁰⁹

The BSF court proceedings were yet to conclude at the time of writing. Farooq Sheikh said he has not been contacted by BSF authorities since he attended the hearing at Panthachowk in 2013.

Farooq Sheikh and his lawyer, Nazir Ronga, continue to fight for the case to be tried in the civilian court: “The fact that the BSF are fighting so hard to bring the case back into the military court makes me suspicious. What are they trying to hide?” says his lawyer.¹¹¹ Having had their appeal to the Supreme Court dismissed once, they applied to the Jammu and Kashmir courts again on the grounds that the Border Security Forces did not try their personnel within the time directed by the Supreme Court. However, the Sessions court in Srinagar

¹⁰⁹ Amnesty International India interview with Nasir Sheikh, victim's cousin, and Farooq Ahmad Sheikh, victim's father, Srinagar, Jammu and Kashmir in November 2013.

¹¹⁰ Amnesty International India interview with Nazir Ronga, family's lawyer, Srinagar, Jammu and Kashmir in November 2013.

directed the family to approach the Supreme Court again to seek re-evaluation of its decision in June 2014.

THE MACHIL CASE

On 28 April 2010, Shazad Ahmad Khan, 27; Riyaz Ahmad Lone, 20; and Mohammad Shafi Lone, 19, travelled to Machil, an area close to the Pakistani border about three hours from their homes, on the promise of work from a man named Bashir Ahmad Lone who lived in their village. They never came back.

The next morning, all three families approached Bashir Ahmad Lone to ask about their sons' whereabouts. He denied he had taken them to Machil the previous day. The next day, there was a report in the media that said that the army had killed three infiltrators in a fake encounter.¹¹¹

The families began to suspect that the militants reported in the newspaper were in fact their sons. They approached Baramulla police station and registered a case against Bashir Ahmad Lone.¹¹² The police began investigations into the case and filed charges of murder and conspiracy to commit murder against 11 persons: two villagers, and nine army personnel (including three officers) which they submitted to the Chief Judicial Magistrate in Sopore, Baramulla District, on 15 July 2010.¹¹³

Media reports quoted senior military commanders expressing their commitment to conducting thorough and transparent investigations soon after the incident occurred. On 7 June 2010, the General Officer Commanding, Northern Command, Lt. General B.S. Jaswal said that the “Army was committed to bring out the truth...The commanding officer of that unit has been removed from command. The second officer has been suspended and an inquiry ordered,” he said in a media report. “It would be totally transparent and the truth will be in front of you.” He also said that “it is very difficult to point out that every encounter is absolutely correct. I believe in my troops and I believe that all encounters are true...unfortunately there are one or two [exceptions]...”¹¹⁴

However, the Indian army refused to produce the accused army personnel for either the purposes of investigation, or in court. Instead, on 10 July 2010, the army notified the Superintendent of Police, Sopore, that a military investigation (Court of Inquiry) was being conducted, and that the “provisions of Army Rule 180 have been invoked in this case as the character and military reputation is at stake/affected. These witnesses will however be made available to the police authorities for the investigation within Army premises.”¹¹⁵

¹¹¹ “Rewind: A look back at 2010 Machil fake encounter case”, Indian Express, 25 December 2013, <http://archive.indianexpress.com/news/rewind-a-look-back-at-2010-machil-fake-encounter-case/1211599/> (accessed 17 April 2015); Basharat Masood, “Macchil: Docs say porters shot from very close”, Indian Express, 22 June 2010, <http://archive.indianexpress.com/news/macchil-docs-say-porters-shot-from-very-close/636830/> (accessed 17 April 2015).

¹¹² Amnesty International India interview with the family of Shahzad Ahmad Khan, Riyaz Ahmad Lone and Mohammad Shafi Lone at their homes in Baramulla district on 24 September 2013.

¹¹³ In the court of the Chief Judicial Magistrate, “Subject: Production of accused persons”, Case FIR no. 23/2010 u/s 302, 364, 120-B, and 34 RPC, 15 July 2010. Copy provided to Amnesty International India by the families of the victims in September 2013.

¹¹⁴ Muzamil Jaleel, “GOC: Trust men but difficult to say every encounter correct”, Indian Express, 7 June 2010, <http://archive.indianexpress.com/news/goc-trust-men-but-difficult-to-say-every-encounter-correct/630445/> (accessed 17 April 2015).

¹¹⁵ Letter from GS Sangha, Brigadier, Presiding officer, Court of Inquiry no. C of I/4 Rajput/57, “Investigation of case FIR no. 23/2010 u/s 364, 302, 120-B, 34 RPC of Police Station – Panzulla, District – Sopore.”, 10 July 2010. Copy provided to Amnesty International India by families of the victims in September 2013.

The investigating officer informed the Chief Judicial Magistrate that “the accused persons have not been handed over to him by the military authorities during investigation, especially for purpose of presentation of challan [charges] at this time.” In an order on 15 July, the Chief Judicial Magistrate stated that under the provisions of the Army Act, the army had no jurisdiction to try the accused persons and that the trial would be conducted by a civilian court.¹¹⁶

On 27 May 2011, the army filed a revision petition before the District and Sessions Court, Baramulla, challenging the Chief Judicial Magistrate’s order of 15 July 2010 seeking the production of the eight army personnel accused in the case.

The army submitted before the court that “some time back in the month of May/June 2010 a few militants were coming back from training [in Pakistan] and in an encounter with army personnel, they were killed. The army reported the incident to the police...some vested interests in order to defame the Armed Forces also lodged a complaint with the police who, without proof and proper investigation, in hot haste, capriciously, and arbitrarily recorded the statement of those persons and have now filed charges before the Chief Judicial Magistrate, Sopore.”¹¹⁷

In the petition, the army referred to the case registered and investigated by the Jammu and Kashmir state police as motivated by “vested interests in order to defame the Armed Forces.” As in other cases, the army claimed that because service in Jammu and Kashmir is considered “active service” at all times, the Chief Judicial Magistrate had no jurisdiction to proceed with the case. The Sessions Court judge, Baramulla, upheld the Chief Judicial magistrate’s orders for the case to proceed in the civilian court, but the army appealed to the High Court.

On 4 July 2012, the Jammu and Kashmir High Court reversed the decisions of the lower courts, and allowed the army to court-martial nine of its accused soldiers. The decision was made just two months after the Supreme Court had held that the army could exercise the option of court-martial in the Pathribal fake encounter case.¹¹⁸

According to media reports, the army began court-martial proceedings on 30 April 2013. Little information became available until media reports on 13 November 2014 that five army personnel, including two officers, had been convicted and sentenced to life imprisonment.¹¹⁹

Although the Machil case was an example of military courts delivering justice for human rights violations, the

¹¹⁶ Order, Chief Judicial Magistrate, “Subject Production of accused person - To Commanding Officer, 4 Rajput”, 15 July 2010. Copy provided to Amnesty International India by families of the victims in September 2013

¹¹⁷ Revision petition before the Principal Sessions Judge, Baramulla, filed on 27 May 2011. Copy provided to Amnesty International India by families of the victims in September 2013.

¹¹⁸ Syed Basharat, “Machil ‘Fake’ Encounter case: HC directs army to decide on court martial of rifleman”, Kashmir Times, 18 March 2013, <http://www.kashmirtimes.in/newsdet.aspx?q=27304> (accessed 10 April 2015).

¹¹⁹ Zahid Rafiq, “Macchil fake encounter: life term for 5 Army men”, The Hindu, 14 November 2014, <http://www.thehindu.com/news/national/other-states/machil-fake-encounter-seven-soldiers-sentenced-to-life-for-killing-three-kashmiri-civilians/article6594347.ece> (accessed 10 April 2015).

5.6 SANCTIONS: A VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW

“If the Army knew they would be charged, and will have to go to court and be prosecuted, they will think ten times before they pull their triggers on an innocent...The AFSPA is a like a blank cheque from the government of India to kill innocents like my nephew. He was only 17 years old.”

Mohammad Amin Magray, Uncle of Javaid Ahmad Magray.¹²⁰

Article 14 of the International Covenant on Civil and Political Rights, to which India is a state party, states that all persons are equal before courts and tribunals. The Human Rights Committee expands on this by stating that the right to equality before the courts and tribunals is “a key element of human rights protection and serves as a procedural means to a

safeguard the rule of law.”¹²¹ Article 14 of the Constitution of India also guarantees to all persons equality before law and equal protection of the law.

A system of sanctions or executive permission to prosecute, which confers special status upon security force personnel and allows them effective immunity for crimes committed, violates India’s obligation under Article 14 of the ICCPR to uphold fair trial standards. The primary institutional guarantee of a fair trial is that decisions will not be made by political institutions but by competent, independent and impartial tribunals established by law. The individual’s right to trial in court, with guarantees for the accused in criminal proceedings, lies at the heart of due process of law.¹²²

Under the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, India has the obligation to “investigate violations effectively, promptly, thoroughly and impartially and where appropriate, take action against those responsible in accordance with domestic and international law.”¹²³ The requirement for executive permission to prosecute human rights violations - including crimes under international law such as torture, enforced disappearances, extrajudicial killings, and rape - serves as an impediment to due process, fair trial, and in the case of Jammu and Kashmir, access to justice, truth and reparation.

¹²⁰ Amnesty International India interview with Mohammed Amin Magray, uncle of the victim, Budgam district, Jammu and Kashmir on 12 September 2013.

¹²¹ Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (UN Doc. CCPR/C/GC/32), 23 August 2007, p. 1, para. 2 & 4, <http://www.refworld.org/docid/478b2b2f2.html> (accessed 10 April 2015).

¹²² Amnesty International, “Right to trial by a competent, independent and impartial tribunal established by law: Separation of powers”, Fair Trial Manual Second Edition (AI Index: POL 30/002/2014), 9 April 2014, section 12.4.1, p. 111. Available at <https://www.amnesty.org/en/documents/POL30/002/2014/en/> (accessed 10 April 2015).

¹²³ Resolution adopted by the General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, p.4, para 3(b)

6. MILITARY (IN) JUSTICE

“If the offence is committed by one person subject to military law against another person subject to military law, then it seems the proceedings are fair. But when the victim is a civilian, the army protects their own, and there is little accountability. I don’t believe they are independent or impartial courts when it comes to trying civilian offences in disturbed areas.”
Justice N Santosh Hegde, retired Supreme Court judge ¹²⁴

6.1 MILITARY JUSTICE AND INTERNATIONAL LAW

There is growing acceptance internationally that military courts should not have jurisdiction to try security forces for human rights violations. International bodies have stated strongly that military courts should not be used to try military personnel accused of human rights violations, particularly where there are limited options for civilians to appeal against the judgements of military courts. Instead, the

jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel, such as desertion or insubordination. ¹²⁵ This has also been affirmed by the UN Special Rapporteur on the Independence of Judges and Lawyers, “regardless of the relative effectiveness of each national military justice system”. ¹²⁶

Principle 29 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity also states: “The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts...”¹²⁷

Principle 9 of the Draft Principles Governing the Administration of Justice Through Military Tribunals states, “In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced

¹²⁴ Interview with Amnesty International India in March 2013. Justice Santosh Hegde led a three-member committee appointed by the Supreme Court in 2012 to investigate cases of alleged fake encounters in Manipur. His report strongly criticized the AFSPA and impunity for security forces.

¹²⁵ Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Draft Principles Governing the Administration of Justice Through Military Tribunals (U.N. Doc. E/CN.4/2006/58), 13 January 2006, Principle No. 8, <http://www1.umn.edu/humanrts/instree/DecauxPrinciples.html> (accessed 10 April 2015). Official link was not available. (Draft Principles Governing the Administration of Justice Through Military Tribunals, 13 January 2006)

¹²⁶ Note by the Secretary-General transmitting, to the General Assembly, the report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut (UN Doc. A/68/285), 7 August 2013, p. 22 para. 98, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/421/29/PDF/N1342129.pdf?OpenElement> (accessed 10 April 2015).

¹²⁷ Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity, Addendum - Updated Set of principles for the protection and promotion of human rights through action to combat impunity, (E/CN.4/2005/102/Add.1), 8 February 2005, p.16, principle 29 (restrictions on the jurisdiction of military courts), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement> (accessed 10 April 2015). E/CN.4/2005/102/Add.1 (8 February 2005).

¹²⁸ Draft Principles Governing the Administration of Justice Through Military Tribunals, 13 January 2006, Principle 9.

disappearances and torture, and to prosecute and try persons accused of such crimes.”¹²⁸ This position has also been upheld by the UN Committee against Torture.¹²⁹

The Working Group on Arbitrary Detention has said that a system in which “even for alleged human rights violations, members of the military... are judged by their own courts, composed entirely of members of the institution in question” goes against the principle of equality before the law.¹³⁰

Similarly, with respect to investigations, an inquiry that is conducted by the same authority accused of the crime raises serious questions about the independence and impartiality of those proceedings. International law requires that crimes under international law be investigated by an independent authority, namely, an authority not involved in the alleged violations. The UN Principles on the Investigation of Torture state that “the investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial.”¹³¹ The Human Rights Committee has stressed that in cases of human rights violations by the military or armed forces, the investigations should be carried out by civilian authorities, in order to ensure independence in investigations.¹³² The International Commission of Jurists has stated that independence can be compromised if investigations into alleged violations by members of the armed forces are carried out by the armed forces themselves.¹³³

6.2 THE MILITARY JUSTICE SYSTEM IN INDIA: FALSE ASSUMPTIONS

The military justice system in India has been a key instrument in shielding alleged perpetrators of human rights violations, particularly those accused of custodial torture and extrajudicial executions, from prosecution and accountability.

¹²⁹ Conclusions and recommendations of the Committee against Torture: Peru (UN Doc. CAT/C/PER/CO/4), 25 July 2006, p. 3-4, para. 16, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&publisher=CAT&type=CONCOBSERVATIONS&coi=PER&docid=453776c80&skip=0> (accessed 10 April 2015).

¹³⁰ Report of the Working Group on Arbitrary Detention: Mission to Ecuador (UN Doc. A/HRC/4/40/Add.2), 26 October 2006, p. 18, para. 83, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/147/35/PDF/G0614735.pdf?OpenElement> (accessed 10 April 2015).

¹³¹ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by General Assembly resolution 55/89, 4 December 2000, principle 2, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/EffectiveInvestigationAndDocumentationOfTorture.aspx> (accessed 10 April 2015).

¹³² See, e.g., Concluding Observations by the Human Rights Committee on Colombia (CCPR/C/79/Add.76), 5 May 1997, paras. 19, 23, 32, 34, (CCPR/C/79/Add.76), 5 May 1997, paras. 19, 23, 32, 34, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.76&Lang=en (accessed 10 April 2015); Concluding Observations by the Human Rights Committee on Venezuela (CCPR/C/71/VEN), 26 April 2001, para. 8, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/CO/71/VEN&Lang=En (accessed 10 April 2015); Concluding Observations of the Human Rights Committee on Kyrgyz Republic (CCPR/CO/69/KGZ), 24 July 2000, para. 7, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/434/59/PDF/G0043459.pdf?OpenElement> (accessed 10 April 2015); Concluding Observations of the Human Rights Committee on Chile (CCPR/C/79/Add.104), 30 March 1999, para. 10, <http://www1.umn.edu/humanrts/hrcommittee/chile1999.html> (accessed 10 April 2015). Official link was not available; Concluding Observations of the Human Rights Committee on Belarus (CCPR/C/79/Add.86), 19 November 1997, para. 9, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/79/Add.86&Lang=En (accessed 10 April 2015); Concluding Observations of the Human Rights Committee on the former Yugoslav Republic of Macedonia (CCPR/C/79/Add.96), 18 August 1998, para. 10, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.96&Lang=en (accessed 10 April 2015); Concluding Observations of the Human Rights Committee on France (CCPR/C/79/Add.80), 4 August 1997, para. 16 et seq, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.80&Lang=en (accessed 10 April 2015); Report of the Human Rights Committee to the General Assembly, 35th period of session, UN Doc A/35/40 (1980), para 249 et seq.

¹³³ International Commission of Jurists, “Requirements of the Investigation”, The Right To A Remedy And Reparation For Gross Human Rights Violations: a practitioners’ guide, 2006, p. 65, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/right-to-remedy-and-reparations-practitioners-guide-2006-eng.pdf> (accessed 10 April 2015).

The Indian army’s Human Rights Cell reported that as of 2011, it has dismissed over 96 percent of the allegations of human rights violations brought against its personnel since 1993.¹³⁴ The army had received 1,532 allegations of human rights violations (995 from Jammu and Kashmir, 485 from North-eastern states, and 52 complaints from other states) out of which 1,508 were investigated, and 24 investigations remained pending as of 2011. Out of a total of 995 complaints of human rights violations against the army in Jammu and Kashmir, 986 have been investigated by the army to date, while 9 investigations currently remain pending. The army says it found through internal enquiries that 961 of these allegations were “false/baseless.” In the 25 cases found to be “true,” it says 129 army personnel were punished.¹³⁵

Separate army records obtained by Amnesty International covering the period 1990-1997 indicate that the army in Jammu and Kashmir found 93 percent of allegations received against army personnel in that period to be “false” or “baseless”.¹³⁶ Some details of the 22 cases the army found to be “true,” were provided in the records: a total of 52 army personnel, including officers, were punished.¹³⁷

Amnesty International India sought details of how investigations and trials were conducted by the military justice system in Jammu and Kashmir in nine cases through a letter to the army’s northern command based in Udhampur, Jammu, and headquarters in Delhi in February 2014. No replies were received. Multiple applications for information under the Right to Information Act sent in 2013 to the Ministry of Defence and Ministry of Home Affairs regarding investigations and trials conducted by the military and security forces since 1990 in relation to Jammu and Kashmir also received no reply.

The Border Security Force and Central Reserve Police Force have played a prominent role in Jammu and Kashmir alongside the army in conducting counter-insurgency operations, and aiding the state police in maintaining law and order. There have been allegations of human rights violations against personnel of the BSF, CRPF and various other forces. However, like with the army, available information raises serious concern about the impartiality of internal investigations and trials against Internal Security Force personnel in security force courts for alleged human rights violations.

In the early 1990s, Asia Watch (now Human Rights Watch) expressed concern that in areas where the security forces were engaged in counter-insurgency operations, the entire civilian population was at risk of torture, pointing to the existence of 63 interrogation centres in Jammu and Kashmir where torture had been reported,¹³⁸ most of

¹³⁴ Indian Army web portal, “Human Right Cell and Handling of Human Rights Violation Cases in the Army”, Annexure I, <http://indianarmy.nic.in/Site/FormTemplate/frnTempSimple.aspx?MnId=TMcObNMKb7TiapbzKWVpeA==&ParentID=mgRuNTM5R9I0qk0JrfPv3Q==&flag=OLsUIhCJDYK2YZORoKE52Q> (accessed 10 April 2015). (Indian Army web portal, “Human Right Cell and Handling of Human Rights Violation Cases in the Army”).

¹³⁵ Indian Army web portal, “Human Right Cell and Handling of Human Rights Violation Cases in the Army”, Annexure I.

¹³⁶ Copies of original documents obtained from the Indian Army in 1997 on file with Amnesty International India. See appendix for copy of records.

¹³⁷ Records obtained by Amnesty International India through the Observer Research Foundation in New Delhi in February 2014 titled “Details of Punishment to Army Personnel for Excess Committed in Jammu and Kashmir as on 23 June 1997”. Eight personnel were sentenced to seven years of imprisonment or more, primarily for charges of rape. Copy on file with Amnesty International India.

¹³⁸ Human Rights Watch/Asia, India: Continuing Repression in Kashmir, Vol. 6, No. 8, August 1994, <http://www.hrw.org/sites/default/files/reports/INDIA948.PDF> (accessed 10 April 2015). See Appendix 1 for list of interrogation centres, p. 22.

45 BSF personnel and 16 CRPF personnel were sentenced to terms of imprisonment as a result of internal disciplinary proceedings for human rights violations in Jammu and Kashmir.¹³⁹ In light of the number of documented cases on record with human rights organizations, serious questions are raised about the commitment of the internal security forces to hold their personnel accountable for human rights violations.

Understanding the military justice system in India

The military justice system in India is set out in law in three separate acts that came into force immediately after independence in 1947: the Army Act 1950; the Air Force Act 1950; and the Navy Act, 1950. The Army Act and Air Force Act were based extensively on the Indian Army Act 1911, a law crafted by the British during their colonial rule of the subcontinent to “enforce discipline in a mercenary force.”¹⁴⁰ No procedural or substantive reforms have been made to these Acts since, despite several recommendations for reform. The Army Rules, 1954 were enacted to set out procedural guidelines for administering the army. Service guidelines including Regulations for the Army, 1987, also exist, which have been criticised for being antiquated.

Each of India’s Internal Security Forces is governed by its own act and rules¹⁴¹ which are largely adaptations of the Army Act and Rules. There are slight variations to the trial procedures for each of the justice systems of the seven Internal Security Forces, and to some degree the processes are less defined, providing for greater ambiguity in the administration of justice within these security forces.¹⁴² There is little information publicly available on the conduct of Security Force Courts.

How the military justice system works

The Army Act provides for four types of courts-martial: general court-martial (GCM); district court-martial (DCM); summary general court-martial (SGCM); and summary court martial (SCM). Courts-martial do not have civil jurisdiction of any kind and exist specifically to try offences committed during war or active service. The GCM and SGCM have the powers to try any member of the armed forces, including officers, for any offence. The DCM and SCM are restricted to trying rank personnel, not officers or commissioned officers (JCOs), and are limited in the sentences they can deliver: two years imprisonment is the maximum punishment delivered by a DCM, and one year imprisonment is the maximum punishment by an SCM.¹⁴³

¹³⁹ Copies of original documents obtained from the Indian Army in 1997 on file with Amnesty International India.

¹⁴⁰ UC Jha, “Right to Fair Trial”, *The Military Justice System in India: An Analysis*, Lexis Nexis- Butterworths Wadhwa, First Edition, 2009, p. 140. (*The Military Justice System in India: An Analysis*, First edition, 2009)

¹⁴¹ The Central Reserve Police Act (1949) and Rules (1955), the Assam Rifles Act (1941/2006) and Rules (2010), the Border Security Force Act (1968) and Rules (1969), the Central Industrial Security Force Act (1968) and Rules (2001), National Security Guard Act (1986) the Indo-Tibetan Border Police Act (1992) and Rules (1994), and the Sashastra Seema Bal Act (2007) and Rules (2009).

¹⁴² The BSF Act and Rules provide for three types of security force courts: general security force courts, petty security force courts, and summary security force courts. The CRPF Act and Rules do not specify judicial procedures except to designate the “commandant” of a unit to be the authority invested with the power to investigate and try offences, and to state that trials shall be in accordance with the Code of Criminal Procedure (1973). Available at http://crpf.nic.in/crpf_actrule/acte.pdf and http://crpf.nic.in/crpf_actrule/rulee.pdf (accessed 17 April 2015).

¹⁴³ The Army Act, 1950 sections 118-120.

There are five key roles in administrating justice within the military:

Title	Role/Responsibility	Who / Appointed by
Convening Authority	Deciding whether to constitute a court-martial, the type of court-martial, and appointing members of the court-martial; ¹⁴⁴ appointing the prosecutor and defence counsel for the accused.	Generally a senior military commander appointed by the central government, or the Chief of Army Staff
Presiding Officer	Conducting the trial and ensuring that the proceedings are carried out in accordance with the Army Act and Rules ¹⁴⁵	The senior-ranking officer appointed by the Convening Authority to serve as a member of the court-martial
Judge Advocate	Ensuring that there are no irregularities in the proceedings and answering questions or clarifying doubts about the law. Attends every general court-martial in an advisory capacity; does not serve as a member of the court martial, or contribute to the findings or sentencing of the accused.	Trained lawyers, and not always military persons, representing the Judge Advocate General's department
Prosecuting officer	Recording the summary of evidence, a pre-trial procedure. ¹⁴⁶	A member of the military appointed by the Convening Authority (in some cases - GCM or DCM - can be a civilian)
Defence Officer or Counsel		Can be appointed by the Convening Authority. The accused may also be represented by any person of his choice as defence counsel, at his own expense. If the accused is unable to procure defence counsel on his own, then the Convening Authority is responsible for ensuring that defence counsel is provided, at a maximum fee of 500 rupees [8 USD] per day. ¹⁴⁷

¹⁴⁴ Army Rules, 1954, rule 37. Available at <http://admis.hp.nic.in/himpol/Citizen/LawLib/Amendments/Army%20Rules%201954/Army%20Rules%201954.htm> (accessed 17 April 2015). (Army Rules, 1954)

¹⁴⁵ The Army Act, 1950 section 128.

¹⁴⁶ The Military Justice System in India: An Analysis, First edition, 2009.

¹⁴⁷ Regulations for the Army, 1987, para 479.

6.3 CONCERNS ABOUT FAIR TRIAL RIGHTS IN MILITARY COURTS

Military courts in India suffer from particular structural flaws causing them to fall short of international fair trial standards, and rendering them unsuitable for prosecuting human rights violations.

The military establishment and those specializing in military law in India, while largely unconcerned about the trial of human rights violations within the military justice system, have acknowledged inherent defects within the military justice system - notably the lack of independence of courts that remain directly under the control of the executive - and encouraged reform.¹⁴⁸

The Supreme Court of India has also criticised the military justice system and recommended reforms on a number of occasions, notably in 1982 when it quoted another judgement which observed, “[c]ourts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of command influence. In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command.”¹⁴⁹

The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception.¹⁵⁰

There exist serious concerns about the independence and competence of military courts in India, ranging from whether the officers appointed to serve as members, and essentially judges, of a court-martial have appropriate training or qualification in law, to whether in exercising their duties as judges, they are subordinate to, or independent of their superiors. Further concerns include the lack of sufficient legal aid counsel to the accused, the lack of an independent appellate tribunal, and trial by summary forms of court-martial that fail to meet international standards of justice.¹⁵¹

6.4 CONCERNS ABOUT THE INDEPENDENCE OF MILITARY COURTS

The dominant role of the commanding officer of the unit, corps or department of the accused in their investigation and trial raises serious concerns about the independence of those appointed to dispense justice (each member of the court is appointed by the convening officer, and is their subordinate in rank). Further, the findings and sentence issued by the court-martial are not valid until confirmed by a confirming officer, who can be the

¹⁴⁸ Navdeep Singh, “Compromise of Judicial Independence: Armed Forces Tribunal and Other Tribunals”, Indian Express, 15 January 2014, <http://www.indianmilitary.info/2014/01/todays-oped-in-indian-express.html> (accessed 10 April 2015). (“Compromise of Judicial Independence: Armed Forces Tribunal and Other Tribunals”, Indian Express, 15 January 2014).

¹⁴⁹ Supreme Court of India, Lt. Col. Prithi Pal Singh Bedi ETC. vs. Union Of India & Others, Writ Petition Nos. 4903 of 1981, 1513 of 1979 and 5930 of 1980 (1982 AIR 1413), Judgment dated 25 August, 1982. Also available at <http://indiankanoon.org/doc/278740/> (accessed 10 April 2015). Official link was not available. (Lt. Col. Prithi Pal Singh Bedi ETC. vs. Union Of India & Others (1982 AIR 1413), Judgment dated 25 August, 1982).

¹⁵⁰ International Covenant on Civil and Political Rights, Article 14(1). Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 17 April 2015).

¹⁵¹ “Compromise of Judicial Independence: Armed Forces Tribunal and Other Tribunals”, Indian Express, 15 January 2014. Also see, The Military Justice System in India: An Analysis, First edition, 2009.

commanding officer, or the superior in the chain of command.¹⁵² The confirming officer thus has the power to revise or seek dismissal of the findings or sentence of a general, district, or summary general court-martial by sending the verdict back to the members of the court-martial.¹⁵³ This has been described as creating the possibility for “unlawful command influence” to be exercised by military commanders over those officers appointed to act as judges in the court-martial.

U C Jha, a former Wing Commander in the Indian Air Force, says, “[A convening authority] is not a lawyer and generally has no formal legal training. His power and discretion to make disciplinary decisions regarding his subordinates stem from his authority as a leader. The commander’s fundamental duty and the need for discipline require him to communicate the organizational policy to his subordinates. This often clashes with another compelling military interest, which is maintaining a fair and impartial system of military justice.”¹⁵⁴

Even the attendance of a convening officer at a court-martial comprised entirely of his subordinates can amount to unlawful command influence. The Supreme Court has noted that officers appointed by the convening authority “must look to the appointing officer for promotions, advantageous assignments and efficiency ratings-in short, for their future progress in the service.”¹⁵⁵

The United Kingdom model of military justice, on which the Army Act and Rules are based, was itself reformed after a landmark judgment issued by the European Court of Human Rights in *Findlay vs. the United Kingdom* in 1997, in which the court ruled that the court-martial was not an “independent and impartial tribunal” because all of the officers appointed to the court-martial were directly subordinate to the convening officer.¹⁵⁶ The European Court also ruled that the lack of legal qualification or experience of the officers making the decisions at both the court-martial and review stages “made it impossible for them to act in an independent or impartial manner.”¹⁵⁷

Although the convening officer has no formal legal training, he is supported by a member of the Judge Advocate General’s department (JAG), the judicial wing of the armed forces, and his decisions are based upon the recommendations of the Judge Advocate. However, the department of the JAG is placed under the administrative and functional control of the Chief of Army Staff, who acts as, or appoints, the convening authority, which could again affect the independence of the JAG officers.

Further, a judge advocate’s presence is not even required in a district or summary court-martial, meaning that there is no one with legal qualifications or training present at these proceedings to advise the members of the court.

¹⁵² The Army Act, 1950, Section 153.

¹⁵³ Army Act, 1950, Section 158 and 160. Note: A summary court martial does not require confirmation but may be carried out on the order of the commanding officer, who in the case of summary courts-martial, acts as the sole judge and prosecutor.

¹⁵⁴ The Military Justice System in India: An Analysis, First edition, 2009, p. 191.

¹⁵⁵ Lt. Col. Prithi Pal Singh Bedi ETC. vs. Union Of India & Others (1982 AIR 1413), Judgment dated 25 August, 1982.

¹⁵⁶ European Court of Human Rights, *Findlay vs. United Kingdom*, Application number: 22107/93, Judgement dated 25 February 1997, para. 70. (*European Court of Human Rights, Findlay vs. United Kingdom*)

¹⁵⁷ European Court of Human Rights, *Findlay vs. United Kingdom*

Concerns about independence of military investigations

Investigations conducted by the security forces have in some cases denied truth and justice to victims of human rights violations, and served to shield perpetrators of human rights violations from prosecution. In cases documented by Amnesty International India and other groups, the findings of army and other security force enquiries have contradicted the findings of police investigations, leading to dismissal of charges against personnel against whom there is credible evidence established by independent investigations.

On 17 August 1990, 23 year-old Mushtaq Ahmad Hajam was returning to his home in Nowhatta, in downtown Srinagar after praying at a nearby mosque, when he was shot by a CRPF constable, according to eyewitnesses.¹⁵⁸

The family filed a First Information Report at the police station the very next day.¹⁵⁹ Riyaz Ahmad Hajam, Mushtaq's brother, said that they heard nothing from the police for three years. In 1993, Riyaz says the police from the local station came to his house and told him and his father that the police had filed the case. The family did not ask questions.

In 1991, CRPF investigations into the alleged extrajudicial killing of Mushtaq Ahmad Hajam absolved the accused constable of criminal responsibility for Hajam's death, stating that he had fired in “self-defence.” The CRPF's findings appear to be based entirely on the testimony of CRPF personnel.¹⁶⁰

Meanwhile, criminal investigations conducted by J&K state police led to them filing charges of murder based on civilian witness testimony against the CRPF constable. The J&K state government forwarded the case to the Ministry of Home Affairs in Delhi for permission to prosecute under section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act in 1996.

In September 1996, the CRPF again instituted a Court of Inquiry into the incident, and again cleared the constable of all charges. Riyaz said that in 1996, representatives from the CRPF had come to their house and summoned Riyaz to their camp at Barzulla in Srinagar. When he arrived there, the CRPF told him to sign a blank piece of paper and narrate the story of the incident. Although Riyaz was not present at the time of his brother's death, he relied on what he had been told by neighbours and the local police. He was the only civilian

¹⁵⁸ Amnesty International India interview with Riyaz Ahmad Hajam, brother of the victim, on 25 September 2013 at his home in Nowhatta, Srinagar, J&K.

¹⁵⁹ During the interview, Riyaz said that he was offering his prayers at a masjid (mosque) in the evening of 17 August 1990. There was curfew until morning, so he was unable to go outside to ascertain the details of what had happened. In the morning, he says the local police came to their house and told them what had happened. Interview with Amnesty International India on 23 September 2013.

¹⁶⁰ Copy of police case diary, in which the result of the CRPF's court of inquiry are written, provided to Amnesty International by the J&K Coalition for Civil Society in September 2013. Copy on file with Amnesty International India.

who testified at the second CRPF Court of Inquiry. The Court of Inquiry did not establish charges against the Constable, stating that all CRPF personnel are trained to take suitable action if a person did not halt on being ordered to.

The police case diary reproduces the text of the judgment issued by the Court of Inquiry, which states, “As Mushtaq Ahmad Hajam hastened his movements on being ordered to stop, the constable was left with no other alternative but to fire. Considering the situation that prevailed in J&K during that period, the Constable cannot be blamed. He was discharging his bonafide duties when the curfew was clamped and it has to be enforced. The very fact that he fired only one round shows that his response was not excessive and that there was no over-reaction on his part.”

The Ministry of Home Affairs also denied sanction to prosecute this case in civilian courts on 14 September 2000. Its reason for denial are virtually identical to the findings of the CRPF Court of Inquiry. It states that, “the constable was carrying out his patrolling duties when he found Mushtaq Ahmad Hajam moving in suspicious circumstances. On being challenged Mushtaq Ahmad Hajam hastened his movements in the darkness. The [constable] fired one round at Mushtaq Ahmad Hajam and he died.”

To date, the police have failed to inform Riyaz about the status of his case. He assumes that the case has been closed.

6.5 TRIALS BEHIND CLOSED DOORS

For victims and their families, another key issue with the current military justice system is the lack of transparency about the status and outcomes of military trials, which effectively deny them the right to truth and remedy.

The father and wife of Tariq Ahmad Sheikh, killed by personnel of the Border Security Force (BSF) in 2000, said the BSF summoned them to testify before a General Security Force Court (GSFC) three times in 2011. The GSFC was conducted against three BSF personnel.¹⁶¹

On 24 December 2011, Tariq Ahmad Sheikh’s wife wrote to the Director Inspector General of the BSF requesting a copy of the final findings of the General Security Force Court.¹⁶² On 25 February 2012, she received a reply from the DIG stating, “as per provisions of BSF Law, witness of the case is not entitled for

¹⁶¹ Srinagar Sector HQrs, Border Security Force, Panthachowk, Srinagar, Jammu and Kashmir, “Summons Signed by SS Chauhan, Asst. Commandant for DIG BSF Srinagar on 18 September 2011 vide letter No.Est/B K Jha/GSFC/11/8099”, 20 September 2011. Copy on file with Amnesty International India.

¹⁶² Copy of letter provided to Amnesty International India by the family of the victim in September 2013.

copy of trial proceedings.”¹⁶³ At the time of writing, the family remains unaware of the final findings and any action taken against the alleged perpetrators.

One of the foundations of a free and fair judiciary is ensuring a public hearing and trial, except in specific narrowly defined circumstances. The verdict and sentence must also be made public. There are no provisions under the BSF Act and Rules that precludes making the status or final results of a GSFC available to the witnesses, and indeed the public at large. The right to a public hearing means that the general public, not just the parties in the case, have the right to be present.¹⁶⁴ Courts must make information about the time and venue of oral hearings available to the public and provide adequate facilities for the attendance of interested members of the public. Juents in all criminal cases and lawsuits are to be made public.

The Army Rules, 1954 state that court-martial proceedings are to be open to the public, unless the court-martial is held in a “closed court” which means only the members of the court, the judge-advocate (if any) and any officers under instruction may be present. The court also retains the power to refuse access to any person, or public in general, if it is “satisfied that it is necessary or expedient in the public interest or for the ends of justice to do so.”¹⁶⁵

However judgments of courts-martial are not made public, and accessing hearings remains difficult for ordinary people. Courts-martial in Jammu and Kashmir generally take place in heavily guarded military areas, typically out of bounds for the general public, making the provision for public hearings meaningless in practice. The Acts and Rules governing the internal security forces do not contain similar provisions for the general public to access security force courts.

6.6 LIMITED RECOURSE TO APPEAL

The Supreme Court's extraordinary appellate jurisdiction, the Special Leave Petition, is barred from reviewing decisions by military courts under the Constitution of India.¹⁶⁶ Before 2009, the entire process of Indian courts-martial was conducted within the ranks of the military, and could not be appealed to a civilian court. The

¹⁶³ Copy of letter provided to Amnesty International India by the family of the victim in September 2013.

¹⁶⁴ International Covenant on Civil and Political Rights, Art. 14(1).

¹⁶⁵ Army Rules, 1954. Sections 80 and 80A.

¹⁶⁶ Constitution of India, Article 136: Special leave to appeal by the Supreme Court states that “(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order pass.”

Armed Forces Tribunal Act, 2007 was enacted to provide an appellate option and recourse to remedy for members of the army, air force and navy, primarily in the interest of protecting the rights of the accused. However there are serious concerns about the independence of Armed Forces Tribunals, given their links with the Ministry of Defence in several respects.¹⁶⁷

Court-martial proceedings are subject to judicial review under Article 32 of the Constitution of India (before the Supreme Court) and Article 226 (before the High Court).¹⁶⁸ Thus, it is in theory possible to challenge the verdict of a court-martial by filing a writ petition under either Article 32 or 226. However, there are no known instances of persons not subject to military law in Jammu and Kashmir challenging courts-martial decisions through writ petitions. The Supreme Court has also ruled that the power of judicial review of a court-martial is limited: it must be confined to examining whether there were egregious errors in the constitution and procedural conduct of a court-martial, and cannot go into questions of evidence.¹⁶⁹

There are no records of victims or their families appealing military court decisions to the Armed Forces Tribunal, or to the Supreme Court in cases of human rights violations in Jammu and Kashmir. Human rights lawyer Parvez Imroz has commented, “Courts-martial proceedings or results are never made public. The access is not there. We have tried to get information but it’s very difficult, if not impossible to get, not even through the Right to Information Act. Without even knowing whether a court-martial was conducted or not, or what the decision was, how can anyone appeal?”¹⁷⁰

In 2009, a proviso was added to section 372 of the Code of Criminal Procedure, 1973 to recognize a victim's right to appeal: “the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.” However, these provisions do not recognize or allow for the victim's right to appeal within India's military justice system.

¹⁶⁷ Ajai Shukla, “RTI reveals MoD largesse to Armed Forces Tribunal”, Business Standard, 2 April 2015, http://www.business-standard.com/article/economy-policy/rti-reveals-mod-largesse-to-armed-forces-tribunal-113040200009_1.html (accessed 16 April 2015).

¹⁶⁸ See Supreme Court of India, *Union Of India & Ors vs Himmat Singh Chahar*, Criminal Appeal No. 201 of 1994 ((1999) 4 SCC 521), Date of Judgment 12 May 1999, available at <http://indiankanoon.org/doc/110393/> (accessed 10 April 2015). Official link was not available (*Union Of India & Ors vs Himmat Singh Chahar* ((1999) 4 SCC 521), 12 May 1999); *Union of India & Ors. Vs. Major A Hussain Ic- 14827* (AIR 1998 SC 577), Date of Judgment 8 December 1997, available at <http://indiankanoon.org/doc/1645476/> (accessed 10 April 2015). Official link was not available (*Union of India & Ors. Vs. Major A Hussain Ic- 14827* (AIR 1998 SC 577), 8 December 1997).

¹⁶⁹ See *Union Of India & Ors vs Himmat Singh Chahar* ((1999) 4 SCC 521), 12 May 1999; *Union of India & Ors. Vs. Major A Hussain Ic- 14827* (AIR 1998 SC 577), 8 December 1997.

¹⁷⁰ Amnesty International India interview with Parvez Imroz, director of JKCCS, in February 2014.

7. FURTHER OBSTRUCTION OF INVESTIGATIONS BY SECURITY FORCES

Obstructions to justice created by sanction provisions and the military justice system are exacerbated by further practices of obstruction and evasion by security forces.

7.1 DELAY IN REGISTRATION AND INVESTIGATION OF HUMAN RIGHTS VIOLATIONS

The first obstacle to justice faced by victims of human rights violations in Jammu and Kashmir is in having their complaint recorded by the police. The state police have been known in the past to refuse to register complaints, or attempt to reduce the gravity of the allegations. Police and court records pertaining to nearly 100 cases of human rights violations filed by families of victims between 1990 and 2012 showed that the Jammu and Kashmir police often failed to register complaints, or take action on registered complaints until compelled by court orders, or by the findings of a judicially-ordered enquiry.¹⁷¹

Families and activists interviewed during the course of Amnesty International India’s research in 2013 said that, in general, access to police stations and ability to register cases against security force personnel has improved since the 1990s, except in the most remote areas. However, they claimed that authorities still fail on the whole to effectively pursue and complete investigations in cases involving security force personnel. Often, as in the past, victims and their families must resort to the courts, or rely on public or political pressure to ensure that complaints are registered and investigations continue.

In the cases of **Mushtaq Ahmad Dar and Mushtaq Ahmad Khan**, it took the police 12 years to register a complaint and investigate their enforced disappearances.

Dar and Khan were both abducted by army personnel in 1997 from their homes in Srinagar – their families never saw them again. Dar worked in a bakery and Khan was a daily wage labourer. The army personnel who took them away accused the two, who were neighbours, of being informers for armed groups, and harbouring arms and ammunition.¹⁷²

Family members said they attempted to register complaints at multiple police stations in Srinagar the day after the incident. Mushtaq Ahmad Dar’s mother said she approached two police stations, the second of which she

¹⁷¹ Court records provided to Amnesty International by families interviewed in September and November 2013. Additional records provided by JKCCS in November 2013.

¹⁷² Amnesty International India interviews with families of Mushtaq Ahmad Dar and Mushtaq Ahmad Khan in September and November 2013 respectively at their homes in Srinagar, Jammu and Kashmir.

believed had registered a complaint, although she did not receive a copy of the written record, as required by Indian law. The family of Mushtaq Ahmad Khan likewise said they had registered a complaint the following day.¹⁷³

After two years of inaction by the police, the family of Mushtaq Ahmad Dar filed a writ petition before the Jammu and Kashmir High Court in 1999, demanding to know his whereabouts, and seeking an enquiry into his disappearance and financial compensation. The Jammu and Kashmir High Court ordered a judicial enquiry on 2 May 2000. The report of the inquiry, completed on 18 July 2000 stated: “Mustaq Ahmad Dar was lifted by 20 Grenadiers of the Army camped at Boatman Colony Bemina on 13 April 1997 and thereafter disappeared.”¹⁷⁴ Based on the findings of the inquiry, the Court ordered police to register a case and investigate Mushtaq Ahmad Dar’s abduction and subsequent disappearance. Despite the order, there is still no record of a case being registered until 2009, more than six years after the court order. The reasons for the delay are unknown.

Investigations into Mushtaq Ahmad Dar’s disappearance were completed in 2012 and the case forwarded to the Ministry of Defence for grant of sanction to prosecute two soldiers. The case was being considered by the Ministry of Defence as of March 2013. No decision has yet been issued, to the knowledge of the family or their lawyer.

The family of Mushtaq Ahmad Khan also approached the Jammu and Kashmir High Court and filed a writ petition in 1999. The court ordered a case of kidnapping to be registered on 7 November 2000 at Batamaloo police station in Srinagar. There is no other information available on record. It is unclear whether investigations were pursued in this case, and no conclusion appears to have been reached.

COMMISSIONS OF INQUIRY

In response to high profile incidents of human rights violations, the state and central authorities have on a number of occasions established judicial and non-judicial commissions of inquiry.¹⁷⁵ Although many of these inquiries have been important in documenting human rights violations committed since 1989, they have been largely perceived by the public in Jammu and Kashmir as a stalling tactic by authorities. Inquiries constituted under the Commission of Inquiry Act, 1952, or by judicial order, are not criminal investigations, and can only result in recommendations to the government. They fall short of establishing individual criminal responsibility and cannot lead directly to criminal prosecution. Their reports are often not made public.

For example, the Pandian Commission, established under the Commission of Inquiry Act, 1952 in 2000 to

¹⁷³ Amnesty International India interviews with families of Mushtaq Ahmad Dar and Mushtaq Ahmad Khan in September and November 2013 respectively at their homes in Srinagar, Jammu and Kashmir.

¹⁷⁴ Enquiry report of the Additional Sessions Judge, Srinagar submitted before the Jammu and Kashmir High Court on 18 July 2000. Copy of enquiry report provided to Amnesty International India by family’s lawyer, Shafkat Hussain, in September 2013 in Srinagar, Jammu and Kashmir.

¹⁷⁵ Umer Maqbool, “Law Department orders 21 enquiries in two decades”, Greater Kashmir, 22 June 2012, <http://www.greaterkashmir.com/news/2012/Jun/23/law-department-orders-21-inquiries-in-two-decades-44.asp> (accessed 10 April 2015).

inquire into the shooting of protesters by the Central Reserve Police Force (CRPF) and Jammu and Kashmir State Police during protests at Brakpora, Anantnag, in south Kashmir, found that four CRPF personnel and three Jammu and Kashmir state police personnel had used excessive force resulting in the deaths of eight civilians. The Jammu and Kashmir government reportedly accepted the Pandian Commission's findings in 2000 and suspended the three police officers indicted by the report but took no further action until 13 years later, on 15 July 2013, when it ordered a further police departmental enquiry.

The inquiry confirmed the findings of the Pandian Commission. The inquiry officer submitted a report to the Principal Secretary Home, Jammu and Kashmir in 2013 stating that "charges of unprovoked and unwarranted firing on a civilian procession are fully established" against four CRPF personnel and three Jammu and Kashmir police personnel. However, the report concluded that "their [the police personnel] suspension for the past 13 years has kept them away from policing and as such a lenient view is hereby taken," and recommended their reinstatement to the police force.

The Jammu and Kashmir state government is reported to have sought permission to criminally prosecute the four accused CRPF personnel. According to media reports, permission to prosecute was denied by the Ministry of Home Affairs.¹⁷⁶ However, no records are available from the Ministry of Home Affairs to confirm this information.

The Inspector General Crime Branch, Jammu and Kashmir, Javaid Geelani, told Amnesty International India that there was a lack of training and modern investigation techniques available to police officers in Jammu and Kashmir. Further, he said Jammu and Kashmir's police force was trained with the mindset of an anti-militancy force, and that the priority for the state police was not investigating crime, but rather the maintenance of law and order.¹⁷⁷

The Inspector General also acknowledged a lack of cooperation between the people and the police and a level of distrust and hostility. He said that years of militancy where the police was seen as a coercive arm of the state had led to a situation where "we lack individual witnesses coming forward to testify." He also blamed the large pendency of cases in the Jammu and Kashmir courts. "Investigations on average should last about six months," he said. "The mean period for a case to [come to a conclusion] in court is 10 years. So, what is the point of a speedy investigation without a speedy trial?"

He acknowledged that several cases being investigated by the Crime Branch against the security forces were older than a decade. "You have to get something that stands in a court of law, and with old cases you can only get ordered depositions. There is no scientific evidence. It's very difficult to fix individual criminal responsibility in cases where no one was originally identified."

¹⁷⁶ Ahmed Ali Fayyaz, "New Delhi kills probe into killings of Kashmir protesters", The Hindu, 31 January 2014, <http://www.thehindu.com/news/national/new-delhi-kills-probe-into-killings-of-kashmir-protesters/article5635876.ece> (accessed 10 April 2015).

¹⁷⁷ Amnesty International India interview with the Inspector General of Police, Javaid Geelani in January 2014, Jammu, Jammu and Kashmir.

“Throughout, police have the control over the investigations. They are not independent investigations. What is difficult is getting a complaint registered against the police. They would file a case against everyone but themselves. It is the main source of impunity for police cases.”

- *Khurram Parvez, spokesperson, Jammu and Kashmir Coalition for Civil Society*

Amnesty International has repeatedly raised concerns about a range of human rights violations committed by the Jammu and Kashmir state police since 1989. Local human rights groups have also specifically named senior police officials as being involved in particular violations.¹⁷⁸ Victims’ families and activists interviewed by Amnesty International India said that the reluctance or failure by police to register complaints against police personnel, and the long delays in completing investigations, were the main sources of impunity for Jammu and Kashmir state police personnel.

In 2003 the National Human Rights Commission released a set of guidelines to be followed by the police in the event of a death as a result of police action.¹⁷⁹ The Chairman of the NHRC at the time, A.S. Anand, a former Chief Justice of India, stated in his letter addressed to all Chief Ministers, “The police do not have a right to take away the life of a person. If, by his act, the policeman kills a person, he commits an offence of culpable homicide or not amounting to murder, unless it is established that such a killing was not an offence under the law.”

The guidelines require all state police forces to inform the NHRC of all cases of deaths as a result of police action, and for the police to register any death by firing as a complaint and to conduct an independent investigation into the incident. Further, the guidelines state that when a complaint is made against the police alleging homicide or any other criminal act, a First Information Report (FIR) must be registered and “invariably investigated by the State Criminal Investigation Department (CID).” In May 2010, the NHRC said in a letter addressed to all Chief Ministers that most states, including Jammu and Kashmir, do not follow the guidelines in their “true spirit.”¹⁸⁰

In Sheila’s¹⁸¹ case, the Jammu and Kashmir state police refused to register a complaint or conduct an investigation into her allegations of torture. A Deputy Superintendent of Police (DSP) allegedly tortured the 16 year-old girl - including subjecting her to sexual violence - on 3 July 2004. According to Sheila’s testimony, the

¹⁷⁸ See ITPK and APDP, “Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir” December 2012, p. 64-68 (Case No. 32 and Case no. 33 as examples).

¹⁷⁹ National Human Rights Commission, “Revised Guidelines/Procedures to be followed in dealing with encounter deaths”, 2 December 2003, <http://nhrc.nic.in/Documents/RevisedGuidelinesDealingInEncounterDeaths.pdf> (accessed 10 April 2015).

¹⁸⁰ National Human Rights Commission, “Revised Guidelines/Procedures to be followed in cases deaths caused in police action” (D.O. No. 4/7/2008-PRP&P), 12 May 2010, <http://nhrc.nic.in/documents/Death%20During%20the%20course%20of%20Police%20Action.pdf> (accessed 10 April 2015). Also see, Supreme Court of India, People’s Union for Civil Liberties & Anr. Vs. State of Maharashtra & Ors., Criminal Appeal no. 1255 of 1999, 23 September 2014, p. 13-15, para. 13, <http://supremecourtindia.nic.in/outtoday/ar12551999.pdf> (accessed 10 April 2015).

¹⁸¹ Name changed to protect identity.

DSP was interrogating her about the death of a CRPF soldier by an armed group earlier in 2004, since she was the deceased soldier’s neighbour.

“It happened when I was 15 or 16 years old. The date was 3 July 2004. I was in the 8th standard, and it was the first day I had ever gotten my period. I remember my friends and me discussing what it was like to have a period... The constables started hitting me, first with their hands, and then with the leg of a chair. The nails that were attached to the rest of the chair were still stuck in the leg. I cried in pain. But they wouldn’t stop.

Once the constables were tired of hitting me with the chair, they went outside and told the Deputy Superintendent of Police (DSP) that I was not going to say anything. So, the DSP told them that he would get the information himself. The DSP came inside the room. I had been looking at the windows for a way to escape but the windows were locked. He kicked me with his shoes on, right in the abdomen. The DSP beat me with the leg of the chair with the nails still in it--on my legs, on my stomach and my vaginal parts. Then I fell unconscious. The nails went inside my legs and made them swell. I was bleeding as someone urinates.”¹⁸²

The day after Sheila was taken into police custody and allegedly assaulted, she and her father went to the local police station in her area to file a case against the DSP, but the police refused to register the case. Sheila says the Inspector General, Jammu and Kashmir, subsequently came to visit her family with a cheque for 200,000 rupees (approximately 3,130 US dollars), and an offer of jobs for her two brothers. She says she told him, “This is an empty gesture. Is this really the government’s response? You can leave the money, but who will protect my family from harassment when you leave?”

Sheila approached the State Human Rights Commission in 2004, which issued a one-page judgment in 2008.¹⁸³ It is the only official document that Sheila has in relation to her complaint. The judgment recommends compensation for Sheila and her family and the registration of a case with the police. Neither recommendation has been implemented.

There is currently no independent police complaints mechanism in Jammu and Kashmir, which goes against directives issued by a 2006 Supreme Court judgment on police reform.¹⁸⁴ In 2012, the Jammu and Kashmir government drafted a Bill to establish Police Complaints Authorities at the state and district level. The Bill has not yet been presented before the state legislative assembly by the Home Department and also suffers from serious flaws.¹⁸⁵

¹⁸² Amnesty International interview with Sheila at her home in Jammu and Kashmir (location withheld to protect anonymity) in September 2013.

¹⁸³ Copy of judgment on file with Amnesty International India.

¹⁸⁴ Supreme Court of India, Prakash Singh & Ors. Vs. Union of India & Ors. (Writ Petition (civil) 310 of 1996), Judgment dated 22 September 2006, <http://indiankanoon.org/doc/1090328/> (accessed 16 April 2015). Official link was not available.

¹⁸⁵ India: Amnesty International Submission to the Jammu and Kashmir Home Department (ASA 20/015/2013), 30 March 2013 <http://www.amnesty.org/en/library/info/ASA20/015/2013/en> (accessed 10 April 2015). Amnesty International India expressed concern about the Bill on a number of grounds including that it limited the scope of the Authorities’ investigations to allegations of “serious misconduct” (defined as death in police custody, grievous hurt, rape or attempt to rape, unlawful detention, and forced deprivation of property) and would therefore exclude complaints of a broader range of human rights violations perpetrated by the police (including for example police failure to register or investigate complaints). The Bill also set a limit of six months from the date of an incident after which an Authority could not entertain a complaint.

7.2 REFUSAL TO COOPERATE WITH INVESTIGATIONS

Reports of human rights violations by personnel from the army and other security forces are usually met with denial. In many cases of alleged torture, deaths in custody, extrajudicial executions and enforced disappearances documented by Amnesty International India, families have stated that security forces first abducted the victim from their home and took them to a nearby security force camp for “questioning” or on “suspicion of being a militant.” Upon their approaching the security force camps, security forces often initially confirm the detention of the victim, but then later deny it, causing delay or halting criminal investigations.¹⁸⁶

Army and other security force officials say that they are concerned about how criminal investigations will affect their troops’ willingness to perform in future counter-insurgency operations. A retired investigator with the Central Bureau of Investigations in Delhi interviewed by Amnesty International India explained that the army feels their personnel must be able to operate without fear of reprisal for their actions, which could limit their effectiveness.¹⁸⁷

Cases documented by Amnesty International India and other groups show that army personnel have been reluctant, or refused, to cooperate with police investigations in some instances. Court and police records collected by Amnesty International India in 2013 clearly show that requests for information made by police during investigations into incidents implicating security force personnel - including requests for the rosters of personnel involved in operations, records of weapons and ammunition used, etc. – have been refused. Police requests for security force personnel to appear for questioning or identification are also frequently turned down by army and other security forces.

One investigator with the Central Bureau of Investigation closely associated with the Pathribal case told Amnesty International in February 2014 that during the initial stages of investigating the deaths of five villagers allegedly killed by army personnel in Pathribal in 2000 (see above), the army refused to cooperate. He said that although the army headquarters acknowledged that it had deployed men to engage in an operation the morning the five men were killed, it refused to disclose the names of those who were present and involved in the encounter.

The CBI was compelled to approach the Ministry of Defence, who ordered the Chief of Army Staff to provide the details of those listed on duty at that time.¹⁸⁸ It was only following this order - which took more than a year to arrive- that the officers presented themselves for questioning.¹⁸⁹

¹⁸⁶ Police fail to investigate further in some cases of disappearance. When security forces deny the arrest of the complainant, police simply file a missing persons report and take no further action until the family files a habeas corpus petition in the High Court of Jammu and Kashmir.

¹⁸⁷ Amnesty International India Interview with a retired investigator from the Central Bureau of Investigation (identity withheld on request) on 8 Feb 2014.

¹⁸⁸ Amnesty International India Interview with a retired investigator from the Central Bureau of Investigation (requested to remain anonymous) on 8 Feb 2014.

¹⁸⁹ Amnesty International India Interview with a retired investigator from the Central Bureau of Investigation (requested to remain anonymous) on 8 Feb 2014.

More recently, army authorities have refused to cooperate with police investigations in the case of 17 year-old Irfan Ganai’s death on 30 June 2013.

Irfan Ganai was sleeping at his cousin’s house on the night of 30 June 2013 in Markundal village, Ganderbal district, when he and his older cousin, Reyaz, woke to the sound of gunshots outside the house. There had been a series of livestock thefts in recent weeks, so they went outside to investigate. “Irfan went a few steps ahead of me,” Reyaz recounted. “We didn’t see the army personnel that surrounded the house. Nobody’s lights were on, so we couldn’t see.”¹⁹⁰ Suddenly, Reyaz heard a gunshot and saw Irfan collapse in front of him, blood seeping through his shirt where the bullet had hit him. He was dead when he hit the ground.

His mother heard the firing from the next house and came out shouting, “Irfan, where is my Irfan?” When she saw Irfan’s body, she lay down and placed her head on his chest and refused to move.

“We know that sometimes when the security forces kill innocents, they try to place a gun on their chest, take a picture to show the police, and then say he’s a militant. We refused to let that happen. We stayed with his body all night. We fought very bravely, and wouldn’t let the body go. We called the Sumbal police station, but they took 15 hours to reach our house. The army personnel kept firing into the air that whole time, trying to scare us, but we would not let go of the body,” Reyaz said.

“Irfan would never have gone into the yard if he had seen the army vehicles, but we didn’t know. We didn’t see. After the army fired, they turned on their headlights from their vehicles and we could see more than 10 army men in the yard.”

Police at Sumbal police station in Ganderbal District registered a First Information Report against unidentified army personnel in a case of murder on 30 June 2013. On 7 August 2013, the Sub-Divisional Police Officer, Sumbal addressed a letter to the District Superintendent of Police, Bandipora, informing him that Sumbal police station had sent letters to the Commanding Officer of the 13 Rashtriya Rifles (RR) on 2 July, 16 July, and 3 August requesting the list of army personnel who participated in the operation on 30 June 2013 in Markundal, the types of weapon carried by each army personnel, and details of vehicles used in the operation with the details of drivers, both civilian and army. He reported that “the army authorities till date [7 August 2013] have not furnished any information as was requested... which has hampered the investigation of the case.”

On 9 August 2013, the 13 RR finally wrote to the District Superintendent saying that they had approached the higher headquarters for sharing the details, and assured full cooperation from the army’s side. However no information was shared. On 27 September 2013, the Sub-Divisional Police Officer sent another reminder to the Commanding Officer of the 13 RR stating that the requested information had still not been provided. To date, the army has failed to respond to the police’s request for information.

¹⁹⁰ Amnesty International India interview with the family of Irfan Ganai in September 2013.

On 5 October 2013, police filed charges against a civilian, Manzoor Ahmad Sheikh, for murder and conspiracy to murder in the case. Sheikh, who is currently on trial, worked as an informer for the 13 RR, and had accompanied the army to Markundal during the operation when Irfan Ganai was shot and killed.

A legal officer closely involved in the prosecution agreed to speak with Amnesty International India on the condition of anonymity in July 2014. He said the police ceased their investigations into army involvement in Irfan Ganai’s shooting once the army refused to provide information. He said that police would file charges against army personnel if further evidence against the army comes to light. He said that no army officers or personnel had testified during police investigations or court proceedings to date, despite being summoned by the police.

7.3 LACK OF INFORMATION REGARDING INVESTIGATIONS

Families interviewed by Amnesty International India routinely said that after filing a complaint and waiting for years, they rarely received any information about the outcome or status of investigations from authorities, even when they made repeated visits to police stations. Families were often denied access to the police station itself, as well as being denied access to speak with the investigating officer or officer-in-charge.

With investigations remaining open and ‘ongoing’ for years, the lack of information is a major obstacle to the victims and families’ struggle for justice.

Under Indian criminal procedure, complainants have few legal rights to information unless it is related to information that they themselves submit (for example, a copy of the complaint registered), or if they request it through the Right to Information Act, which is often a long and complicated process.

The majority of families interviewed had struggled to get any information about the status or result of investigations from the police. As a result, many were unaware of whether their cases were ongoing or closed. In some cases, they were not even aware that the investigations in their cases had been completed and sent to the central government for sanction to prosecute members of the police or security forces.

Many families met by Amnesty International India said that they had stopped trying to get information as each time they visited the police station, police personnel would turn them away, saying that the investigating officer concerned was not present, or simply telling them to come back another time.¹⁹¹ Those who approached the courts and filed petitions claiming police inaction often had greater access to information.

The experience of Ghulam Mohammad is emblematic. His son, Abdul Hamid Dar, 30, was arrested by the

¹⁹¹ In some cases, local lawyers and activists explain, the failure of the police to keep the family members aware of the status of the complaint and investigation was partially a result of a communication gap between the investigating officer at the concerned police station and the families. When the investigation ends, a case is often termed by the investigators in the relevant police station as “closed as challaned”. This means that the investigation is complete and the chargesheet has been forwarded to the police headquarters to seek sanction to prosecute from the central government. However families are unaware of this and when they are told that the case is “closed as challaned” without any further explanation, they often take the word “closed” to mean the case is indeed closed and nothing more can be done.

army on 29 December 1995. When the family approached the nearest army camp at Sheeri, Baramulla District, the army personnel confirmed that their son was being held there, and said he would be released soon.

On 8 January 1996, the family was allowed to meet Abdul at the Boniyar camp. However, Ghulam Mohammad Dar recounted that the family was required to stay behind a fence, while Abdul Hamid was propped up on a bench a few yards away on the other side of the fence, in the army camp. Abdul did not speak. “He was seated a distance away, and we were not allowed to speak to him. He wasn’t moving,” said his father, Ghulam Mohammad. “He wasn’t alive. It was only a body we saw.” Shortly after, he said, he saw Abdul Hamid’s body brought to the Sheeri Police Station, where the Station House Officer refused to accept it. After that, army personnel at Boniyar Camp refused to let Ghulam Mohammad see Abdul. Ghulam Mohammad believes that the army personnel disposed of Abdul’s body when the police station refused to accept it.

Ghulam Mohammad says that on 20 January 1996, a few days after approaching the army camp for his son’s release, he went to Sheeri Police Station to register a First Information Report, but the officer in charge refused to register the case. “He didn’t agree to register the case, he was a very corrupt person. After eight days we came to know that the case was not registered. We had tried to register on 20 January 1996, but he did not give us a copy of the complaint.”

According to a copy of the First Information Report, the police appear to have registered the case five months later, on 24 June 1996. However, Ghulam Mohammad said that he had no faith in the police, as they had initially refused to file a complaint. So he filed a habeas corpus petition in the High Court on 11 July 1996. The Court ordered a judicial enquiry into the case on 22 July 1997. Ghulam Mohammad said that the enquiry report was submitted a year later, but he was unaware of the contents. Amnesty International India was unable to find a copy of the enquiry report.

“We were only called for hearings, they didn’t tell us anything. The army also came...[to the hearing]. During the proceedings, the army counsel would tell us that Abdul Hamid won’t come back, so just take compensation. But if we took the money, it would be like selling my son. We can’t fight for justice if we take the money,” Ghulam Mohammad said.

According to the state’s reply to the family’s petition in the High Court, the army denied the arrest of Abdul Hamid Dar and claimed that the police had him in custody at the Joint Interrogation Centre when he went missing. The Centre falls under the jurisdiction of the Jammu and Kashmir State Police.

The criminal investigations in the case lasted for approximately ten years before the State Home Department, Jammu and Kashmir forwarded the case to the central government for grant of permission to prosecute two army personnel. On 6 December 2011, the Ministry of Defence denied permission to prosecute.

Ghulam Mohammad Dar and his family were never informed of what happened in their case. A court-appointed lawyer told them that their case had been sent to Delhi. “We don’t know why or for what the

case was sent to Delhi,” said Ghulam Mohammad. “The lawyer told us that this court could not decide on the case, so it has been sent to Delhi for a decision. We don’t know what happened with it. Our lawyer told us that the case had come back to the police for clarification and that the police had to reply. That never happened. After that, we didn’t bother to follow the case.”

Parvez Imroz, the head of JKCCS and a veteran lawyer and human rights activist told Amnesty International, “The authorities don’t really want families to know about the process. One officer at a Deputy Inspector General-level told me, ‘Why should the family be involved? Is it a legal obligation for the family to be informed? They get some compensation, so why do they need to be involved?’ This was a genuine query and surprise on his part. This is the mentality in the police and administrative departments.”¹⁹²

In 1999, the National Human Rights Commission detailed a series of measures to improve the relationship between the police and public, which were sent to all states’ Director Generals of Police and the police commissioners of select cities. One measure highlighted was the need for investigating agencies to keep the complainants or victims of a crime informed of the progress of an investigation. The National Human Rights Commission stated that the “bulk of complaints received by the NHRC concerns security forces...most of such complaints relate to alleged commissions and omissions on the part of the police during the investigation. Many of them pertain to non-registration of complaints, delayed investigations, investigations not being done fairly, objectively and impartially and the inaccessibility of police officers.”¹⁹³

The NHRC stated that in the event an investigation is not completed within three months, the complainant or victim must be informed in writing of the specific reasons for not completing the investigation. “Such reasons could be the inability to arrest the accused, the inability to complete examination of all witnesses, non-receipt of report from the expert, non-receipt of prosecution sanction, legal impediment and similar specific reasons,” wrote the NHRC. The Commission wrote that the complainant should also be informed of reasons for not completing an investigation at six months, and again at one year with a more detailed report issued by the investigating officer. This practice was not followed in any of the cases researched by Amnesty International India.

7.4 COMPENSATION AND PRESSURE ON FAMILIES TO WITHDRAW THEIR COMPLAINTS

Families of victims, lawyers and activists in Jammu and Kashmir told Amnesty International India that it is often difficult to register and pursue cases against security forces because of threats, intimidation and harassment. An “incentive” often invoked by police and security forces to pressure families to withdraw cases is financial compensation, given without accepting any liability.

¹⁹² Amnesty International India interview with Parvez Imroz in November 2014 at his office in Srinagar, Jammu and Kashmir.

¹⁹³ NHRC, “Need for the investigating agencies to keep the complainants/victims informed of the progress of investigation” Measures to Improve Police-Public Relationship and Confidence, 22 December 1999, p. 75

In some cases, families interviewed said that the police had threatened to withhold compensation until the families agreed to withdraw their complaint against the security forces. In other cases, families admitted, they had themselves refused to accept compensation for fear that the authorities would view the gesture as an acceptable remedy, and deem the investigation and prosecution of the alleged perpetrators unnecessary.

Many families interviewed by Amnesty International India and other human rights groups in Jammu and Kashmir said that they thought that accepting financial compensation from the state government, either through official or unofficial routes, would mean that they could no longer pursue investigations in their cases. Other families believed that state compensation was a form of bribery to get them to cease pursuing their cases.

The Jammu and Kashmir state government provides two kinds of compensation to victims of violence or law and order disturbances: financial relief, known as ex-gratia relief, offered without any acceptance of liability, and “compassionate employment”.¹⁹⁴ The rules for ex-gratia relief detail that the compensation should be provided to the dependants of magistrates and police personnel, central reserve police forces and military, other government officials, and residents of Jammu and Kashmir who suffer death or permanent disability as a result of militancy or law and order-related violence.¹⁹⁵

For persons other than government employees, the rules state that the ex-gratia relief is only available to individuals who were not “directly or indirectly in actual violence or instigation thereof” and “were killed innocently.”¹⁹⁶ The inability of families to prove that a relative was involved in violence and killed innocently, particularly in the face of security force counterclaims over the circumstances of violent deaths, puts them in a vulnerable position in relation to a right to ex-gratia relief. A number of families interviewed said they were told by the police that if they withdrew their complaints, the police would not claim that their deceased family members were involved with the militancy – and this would allow the compensation process to proceed.

Families of victims of enforced disappearance face a further challenge in obtaining compensation from the government. In order to obtain financial compensation or compassionate employment, a death certificate of the victim must be produced. The authorities do not formally recognize enforced disappearances, and term a disappeared individual as “missing”, and declare them legally dead only after seven years. The rules state that if a person is reported missing, or his body has not been identified, relief can be sanctioned by the authorities only if the District Magistrate issues a report confirming death, or if the family provides surety that they will return the ex-gratia relief if the death did not actually take place. In practice, compensation is rarely granted under these circumstances.

The Association of Parents of Disappeared Persons (APDP) reported in 2011 that wives of disappeared men -

¹⁹⁴ Under rules issued by the Jammu and Kashmir state government in 1994 (SRO-43)

¹⁹⁵ Government of Jammu and Kashmir General Administration Department, Grant of relief to the persons affected by the law and order disturbances (Order No. 723-GR (GAD) of 1990), 10 July 1990, p. 3, <http://jkhome.nic.in/Ex-Gratia-Rules.pdf> (accessed 9 April 2015).

¹⁹⁶ The family of an individual killed who is not a government employee is eligible for 100,000 rupees [1,570 USD]. Compassionate employment under the SRO-43 rules is provided to the family or other dependents of a “civilian who dies as a result of militancy-related action, but not involved in militancy-related activities and total income of the family from all sources does not exceed 5,000 rupees [78 USD] per month.

or “half-widows” as they are locally known – were only able to access ex-gratia compensation and compassionate employment with the production of a death certificate, and proof that the deceased had no link with militancy.¹⁹⁷

Zahoor Wani, an activist who has worked with APDP for 17 years, said, “Often the state leads families to believe that compensation equals justice, and that if they accept compensation they are forfeiting the pursuit of prosecution against the accused.” He said it was difficult to convince families to pursue justice in these cases. In many cases, he said, the families of the disappeared are concerned about the future of the family, especially if the one who was disappeared was the main source of income for the household.¹⁹⁸

Mam Khatoon, the wife of Mehrajuddin, a man from rural Baramulla district who was allegedly disappeared by the army in 1999, said the state had been promising her compensation for several years. Mam Khatoon is illiterate and works as a daily labourer when she can, and depends on her husband’s brothers for her livelihood.¹⁹⁹ She told Amnesty International that army personnel came to her house in the early morning of 20 August 1999 and took Mehrajuddin with them, claiming that he worked as a guide for militant groups operating in the area. “We went to the army camp asking for him, and at first they said they would release him. But they did not. Finally, we went to the police,” she said.²⁰⁰

Mam Khatoon recalls the police telling her after she filed a petition in the Jammu and Kashmir High Court in 2000 concerning her husband’s disappearance that if she and her husband’s brothers took the compensation offered by the state, they would not need to pursue the case any further. Farooq, Mehrajuddin’s brother-in-law, says their family was unable to afford to travel to Srinagar to continue pursuing the case in the High Court, and he preferred to take the compensation and withdraw their petition. He said that they had been pursuing the case through the courts and the State Human Rights Commission with no success for several years. “Since the army cannot be punished, you cannot register anything against them. So, what kind of justice will my brother get? And when the police and army work together what can you expect?” Farooq said. Despite these reservations, the family decided not to withdraw the case.

While compensation to the victim and their families is a crucial element to redress violations, it cannot replace the vital judicial process of bringing a perpetrator to justice through criminal investigation and prosecution in a court of law. The Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has said that the “practice of paying compensation to victims or their respective families in cases of unlawful killings, while not pursuing criminal investigation and prosecution of the perpetrators in their cases further perpetuates impunity due to an absence of individual accountability.”²⁰¹

¹⁹⁷ Association of Parents of Disappeared Persons, *Half Widow, Half Wife? Responding to Gendered Violence in Kashmir*, July 2011, p. 16, <https://kafilabackup.files.wordpress.com/2011/07/half-widow-half-wife-apdp-report.pdf> (accessed 10 April 2015). Official link was not available.

¹⁹⁸ Amnesty International India interview with Zahoor Wani, September 2013 in Srinagar, Jammu and Kashmir.

¹⁹⁹ Amnesty International India interview with Mam Khatoon and her brothers-in-law in November 2014 in Baramulla District, Jammu and Kashmir.

²⁰⁰ Amnesty International India interview with Mam Khatoon and her brothers-in-law in November 2014 in Baramulla District, Jammu and Kashmir.

²⁰¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2013, p. 15, para. 73.

8. CONCLUSIONS AND RECOMMENDATIONS

Impunity is a long-standing problem in Jammu and Kashmir. The lack of political will to account for past and present actions of the security forces, including the state police, is fortified by legislation and aggravated by other obstacles to justice, especially for those who lack financial resources or education. To date, not a single alleged perpetrator of a human rights violation has been prosecuted in a civilian court. Victims and their families routinely face intimidation and threats from the security forces when attempting to bring cases against soldiers.

The climate of impunity encourages human rights violations to continue. Faith in the government and judiciary is almost non-existent in Jammu and Kashmir. Although human rights defenders and activists say that levels of violence from armed groups have gone down in recent years, as have direct threats and intimidation by the army and other security forces, obtaining justice continues to remain out of reach.

Trust in the judiciary is low among families of victims. Families repeatedly frustrated by the process now refuse to pursue cases as they feel that attempting to bring cases against the state is a pointless venture. Lawyers and activists speak out against impunity in the system, but their protests are met with little action by the state.

There are policy changes that would increase accountability – such as repealing provisions requiring sanction to prosecute members of the security forces, granting sanction in previously denied and currently pending cases, ensuring independent investigations, and excluding the option for trial by military courts in cases of human rights violations by security forces; but political will to enact them remains mercurial.

In Jammu and Kashmir, ensuring accountability would include ensuring access to information for victims and families during police investigations, and guaranteeing due process when victims attempt to bring complaints against their abusers.

Addressing Jammu and Kashmir's impunity problem, and indeed India's attitude towards impunity, is a challenge; but it is essential to ensure justice to victims of human rights violations, and facilitate the healing process for those who have suffered during the course of Jammu and Kashmir's decades of struggle and alienation.

RECOMMENDATIONS

Both the Government of India and the Government of Jammu and Kashmir must take immediate steps to ensure that all human rights violations and crimes under international law alleged to have been committed by Indian security forces, including the police, in Jammu and Kashmir are investigated by independent and impartial authorities, and where there is sufficient admissible evidence, those accused are prosecuted in

proceedings which meet international fair trial standards and do not impose the death penalty.

Further, Amnesty International India recommends

TO THE GOVERNMENT OF INDIA:

Investigation and Prosecution

Remove all requirements of sanction or any prior executive permission for the prosecution of security force personnel from all relevant legislation including the Armed Forces Special Powers Act and the Code of Criminal Procedure.

Limit jurisdiction of military courts in India [by amending all relevant legislation, including service acts (e.g. Army Act and Rules, Border Security Force Act and Rules, and Central Reserve Police Force Act and Rules)] only to offences of a strictly military nature committed by military personnel. In the interim, immediately ensure that victims and their families remain informed, in writing, of the status of any ongoing military and security force proceedings at all stages of the process, from investigation to prosecution, at regular intervals;

Ensure that where sufficient admissible evidence has already been collected through previous criminal investigations into human rights violations by members of security forces, the prosecutions take place in regular courts, including, where necessary, by granting sanction from the Ministry of Defence or Ministry of Home Affairs.

Right to Truth

In order to ensure the right to truth for victims, their families and affected communities and ensure that they have access to full disclosure about human rights violations, the Government of India should:

- Make information pertaining to the proceedings, verdicts and sentences of courts-martial and security force courts publicly accessible including through the Right to Information Act, 2005 and by other means including an online database.
- Accept and facilitate a request from the Working Group on Enforced or Involuntary Disappearance to visit India and invite the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to visit; ensure that both are granted unimpeded access to Jammu and Kashmir and all other relevant locations and are able to meet freely with a wide range of stakeholders, including victims and their families, civil society organizations, government officials and members of the security forces;

Legislation and Ratification

- Repeal the Armed Forces Special Powers Act and ensure that all other national security legislation complies fully with India's international legal obligations and is in line with international standards including the UN Principles for the Prevention of Extra-legal, Arbitrary and Summary Executions;

- Define all crimes under international law and principles of criminal responsibility in Indian law in accordance with international law and standards,
- Ensure that torture is defined in Indian law in a manner consistent with the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- Ensure that enforced disappearances are defined in Indian law in a manner consistent with the International Convention on the Protection of All Persons from Enforced Disappearance.
- Become party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, without making any reservation or declaration amounting to a reservation, and implement the Convention effectively into national law.
- Become party to the International Convention for the Protection of All Persons from Enforced Disappearance, without making any reservation or declaration amounting to a reservation, recognize the competence of the Committee on Enforced Disappearances to receive and consider communications from or on behalf of victims and other states parties, and implement the Convention effectively into national law.
- Accede to the Rome Statute of the International Criminal Court without making any declaration amounting to a reservation and implement it effectively into national law.

TO THE GOVERNMENT OF JAMMU AND KASHMIR:

- Ensure the right to truth by keeping victims and their families informed of the status and results of investigations and prosecution by all authorities, as required under international human rights law, when investigating and prosecuting allegations of serious human rights violations, and at minimum as laid down by the measures to improve public-police relations issued by the National Human Rights Commission in 1999.
- Make publicly available the findings of all past inquiries of human rights violations in Jammu and Kashmir. Where reports contain the names and other personal identifiers of victims, witnesses and suspects, these should be removed before publication to protect all victims, relatives and witnesses;
- Review and independently evaluate past compensation mechanisms, including the ex-gratia rules, to ensure that victims and their relatives receive appropriate compensation, free from threats, harassment and discrimination. Particular attention should be paid to victims and their relatives who live in difficult to access areas (rural, mountainous, etc,) or may suffer stigma for the crimes committed against them, as is the case for survivors of crimes of sexual violence.

- Establish an independent police complaints authority to ensure the registration of all complaints brought against police personnel and ensure that such complaints are investigated in an impartial, effective and prompt manner.

TO THE NATIONAL HUMAN RIGHTS COMMISSION AND THE JAMMU AND KASHMIR HUMAN RIGHTS COMMISSION:

- Ensure the victims and their families’ right to truth by involving the victim and their families at every stage of a Commission-led enquiry, particularly if the complaint was filed by a third party and not the victim or their immediate family. Preserve the right of the family to choose whether to proceed with an enquiry and what information is placed in the public domain at all times.

TO THE GOVERNMENT OF INDIA AND THE GOVERNMENT OF JAMMU AND KASHMIR:

- Establish a programme to provide full and effective reparation (including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) to all victims of past human rights violations in Jammu and Kashmir. This should include, in consultation with civil society organizations and victims’ groups, steps to publicly acknowledge the occurrence of human rights violations in Jammu and Kashmir and obstruction of justice for victims;
- In order to ensure non-repetition of human rights violations, temporarily remove or suspend from active duty any member of the security forces or other government agency against whom there is credible evidence of human rights violations, pending completion of an independent investigation;
- Ensure that law enforcement personnel, including security forces that carry out law enforcement duties, are trained in upholding international standards, including the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

ANNEXURE 1

THE INDIAN MILITARY JUSTICE SYSTEM: INVESTIGATION PROCEDURE

Hearing of the charge/Court of Inquiry: In the military justice system, charges are brought against personnel in two ways:

1. An allegation against an accused can be brought to their commanding officer who hears testimony from witnesses and others in the presence of the accused; the accused is allowed to cross-examine anyone testifying for or against him.
2. A charge may be established through a court of inquiry: the equivalent of a military investigation.

According to Lieutenant General Nilendra Kumar, a former Judge Advocate General, courts of inquiry are generally established when the identity of the accused is not known.

After the commanding officer hears the charge, he can take one of four actions:

1. Refer the case to a superior military authority for evaluation
2. Order a trial by summary court-martial
3. Dismiss the charges
4. Adjourn the case to have the evidence reduced to writing through a ‘Summary of Evidence’ procedure (after consulting the appropriate Convening Authority - either his superior or the Chief of Army Staff).

Summary of Evidence: When the case is tried by a general, district, or summary general court martial, the next pre-trial procedure is the summary of evidence. This is a procedural, rather than substantive step in which an officer appointed by the convening authority or commanding officer records the statements of witnesses heard by the commanding officer during the hearing of the charge procedure. The accused may cross-examine any witness and have that recorded as well.

Remand of accused: After the officer records the summary of evidence, the commanding officer considers the evidence and statements recorded and either orders a trial by court-martial, refers the case to his superior, or disposes of the charges. This is the last pre-trial step before a court-martial begins. If the commanding officer orders a trial by court-martial, the convening authority (who may also be the commanding officer) appoints the members of the court, prosecuting officer, and completes other requirements for carrying out the trial.



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“DENIED”

Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir

This report documents obstacles to justice for victims of human rights violations existing in both law and practice in Jammu and Kashmir, and shows how the government's response to reports of human rights violations has failed to deliver justice for several victims and families. In writing this report, Amnesty International India analyzed government and legal documents related to over 100 cases of human rights violations committed between 1990 and 2013, and interviewed families of victims, their lawyers, journalists, academics, civil society activists, and state and central authorities.



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